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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 524

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLMAN, as Trustees of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CARTER H. HARRISON, JR., STEPHEN V. R. CROSBY, CHARLES F. GREY AND GEORGE E. PIKE, as the Protective Committee for The Chicago Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

By LOY N. McINTOSH,
135 South LaSalle Street,
Chicago, Illinois.

MCCORMICK AND HENDERSON, INC., CHICAGO

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der and judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 355), which was entered on the 23rd day of May, A. D. 1946, and in connection with which judgment petitioners, on June 7, 1946, filed their petition for re-hearing, which petition by order of the United States Circuit Court of Appeals, for the Seventh Circuit was, on June 20, 1946, denied (App., "A" *infra.*, p. 36, which affirmed an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 15, 1945, R. 309-316), approving a plan of reorganization of the Rock Island Railroad.

Opinions Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (R. 301-308) was filed on May 14, 1945. It has not been reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 343-355) was filed on May 23, 1946, and the petition for rehearing was denied on June 20, 1946 (App. "A", p. 36) and has not as yet been reported.

Jurisdiction.

The order and judgment of the United States Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was entered on May 23, 1946, and was modified on June 20, 1946, the date on which petition for re-hearing was denied. Jurisdiction to issue the writ requested is found in the provisions of Section 24(c) of the Bankruptcy Act and Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347(a)).

Statute Involved.

The pertinent provisions of the Bankruptcy Act, as amended, are found in Appendix "B", *infra*, pages 37 to 41.

Statement.

The Chicago, Rock Island and Pacific Railway Company, the principal debtor, a railroad corporation, on June 7, 1933, filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, stating that it was unable to meet its debts as they mature and that it desired to effect a plan of reorganization under Section 77 of the Act of July 1, 1898, entitled, "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended. The District Court, on June 7, 1933, approved the petition as properly filed and authorized the debtor to continue in possession and control of its properties and assets. Thereafter certain railroad corporation subsidiaries of the principal debtor filed similar petitions in the same proceedings. Each of said petitions stated that the respective petitioner desired to effect a plan of reorganization in connection with the plan of reorganization of the principal debtor. Said petitions were approved by the District Court as properly filed. On November 22, 1933, Trustees of the estates of the several debtors, effective December 1, 1933, were appointed. Said appointment was made permanent by order entered December 28, 1933. The trustee first appointed took possession of the properties and assets of the several debtors on December 1, 1933, and since that time they or their respective successors in office have continued in possession and control of the debtors' properties and the operation thereof.

Plans of reorganization were presented to the District Court and to the Interstate Commerce Commission by the principal debtor on July 15, 1936, and by others on or about July 20, 1938. Hearings on said plans were held by the Commission beginning October 6, 1936, the final hearing

being closed on July 7, 1938. In September, 1939, the Commission's Examiner issued a proposed report as to a plan of reorganization for the several debtors and in connection with the exceptions and briefs, oral arguments were had before the Commission on December 7th and 8th, 1939. The Commission issued its report and order on October 31, 1940, approving a plan of reorganization for the debtors to which various petitions for modification were filed, and on July 31, 1941, the Commission issued its supplemental report and order wherein it modified the plan in certain respects. To eliminate certain errors and inconsistencies in the approved plan, the Commission issued a further supplemental report and order on October 2, 1941, and again on April 6, 1942. After hearings were had upon said plan of reorganization, as modified, which hearings were concluded on October 17, 1941, the District Court, on June 3, 1943, filed its opinion approving said plan except as to two matters. On June 25, 1943, the District Court entered an order referring the proceedings back to the Commission for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act *and the Court's opinion,* and, in addition, for the Commission's determination in the first instance of certain matters recited in said Court order. The Commission within six months from the date of the order of re-reference held further hearings on September 1, 1943, and thereafter made its supplemental report and order dated January 3, 1944, approving a further modified plan of reorganization containing modifications in accordance with the said opinion of the Distrct Court and the order referrng the proceedings back to the Commission.

On August 30, 1943, which was prior to the hearing on September 1, 1943, petitioners filed their petition with the Commission for an order by the Commission that all proceedings before it (pursuant to the order of the District

Court referring the proceedings back for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act), be *de novo* under the provisions of Subsection (d) of Section 77 of the Bankruptcy Act, except that the Commission by its order specify the date on or before which the debtor should file a new plan of reorganization, and within which time other parties in interest could file their respective new plans of reorganization. (A copy of said application appears as Apendix C hereto attached, page 42.) This motion was by the Commission, on October 4, 1943, denied (Appendix E page 66.)

On November 20, 1943, these petitioners filed their petition with the Commission for reconsideration of the Commission's order dated October 17, 1943, denying the petition that the proceedings before the Commission on the re-reference be *de novo,* and for an opportunity to introduce additional evidence. (App. D page 55) This petition was denied by the Commission.

The Commission certified to the District Court its supplemental report and order dated May 1, 1944, approving a plan of reorganization for the debtor as further modified, and the plan so approved is the plan which came on for hearing before the District Court on June 23, 1944.

On June 16, 1944, these petitioners filed with the District Court their objections to the plan of reorganization of the debtors, as modified and approved by the Interstate Commerce Commission on May 1, 1944, (which objections appear in App. F, page 68). These objections, mainly, were: (1) that the plan as modified is not based upon new findings subsequent to the re-reference to the Interstate Commerce Commission by the Court; (2) that on the re-reference the Commission denied the motion that the proceedings on re-reference be *de novo* under Subsection (d) of

Section 77; (3) that on the re-reference the Commission refused to permit the record before it to be brought down to date to show the financial condition of the debtor; and (4) that the plan as modified is unfair and inequitable because it uses as the normal earnings period the years 1936 and 1937.

On June 15, 1945, the District Court entered its order overruling all objections and, with certain corrections, approving the plan of reorganization as modified by the Commission in its supplemental report and order entered May 1, 1944, in which report the Commission denied the motion of these petitioners that the procedings on the re-reference to it be *de novo* in disregard of Subsection (d) of Section 77 of the Bankruptcy Act.

On June 20, 1946, the United States Circuit Court of Appeals for the Seventh Circuit entered its order denying the petition of these petitioners for review of its judgment entered May 23, 1946, and on June 20, 1946, after modifying its said judgment, affirmed the order of the District Court which approved the plan of reorganization of the debtor.

Question of Federal Law which has not been but should be settled by this Court.

The United States Circuit Court of Appeals for the Seventh Circuit decided for the first time in railroad reorganizations under Section 77 of the Bankruptcy Act, as amended, that Subsections (d) and (e) of said Section do not require the Interstate Commerce Commission to proceed *de novo* on a re-reference to it by the District Court. This is an important question of Federal law which has not been and should be settled by this Court.

Questions Presented.

1. May the District Court, in an order referring a plan of reorganization of a railroad back under Section 77 of the Bankruptcy Act, as amended, to the Interstate Commerce Commission, limit the scope of the proceedings before the Commission on such re-reference?

2. Must the Interstate Commerce Commission on a re-reference to it by the District Court under Subsection (e) of Section 77 of the Bankruptcy Act proceed *de novo* under the provisions of Subsection (d) of Section 77 of the Bankruptcy Act, as amended?

3. Whether or not the District Court and the Circuit Court of Appeals erred in approving the plan or reorganization of the debtor based upon proceedings before the Interstate Commerce Commission upon a re-reference to it by the District Court wherein the Commission refused to proceed *de novo* under the provisions of Subsection (d) of Section 77 of the Bankruptcy Act?

4. Whether the plan of reorganization approved by the Commission, the District Court and the Circuit Court of Appeals is "fair and equitable" and in the "public interest" in view of the definite conflict between the Congress of the United States and the President on the one side and the Interstate Commerce Commission on the other as to the meaning of these words and the discretions given to the Commission by them?

5. Section 77 is a Bankruptcy Act. It was held to be constitutional because it rested on bankruptcy powers (*Continental Illinois Bank* v. *Rock Island*, 294 U. S. 608). Are stockholders required to sacrifice their interests to create a depression-proof railroad or is it the duty of the Commission, in the formulation of a plan of reorganization of

a railroad to preserve the properties for the debtor, *i.e.*, its creditors and stockholders?

6. If at the end of the Court's administration the assets in the hands of the Court exceed the principal amount of all claims, as they do in this case, can stockholders be cut out by the accumulation of interest *pendente lite* in favor of creditors?

Reasons For Granting Writ.

I.

The United States Circuit Court of Appeals for the Seventh Circuit decided for the first time in railroad reorganizations under Section 77 of the Bankruptcy Act, as amended, that Subsections (d) and (e) of said Section do not require the Interstate Commerce Commission to proceed *de novo* on a re-reference to it by the District Court. This is an important question of Federal law which has not been and should be settled by this Court.

The opinion by the United State Circuit Court of Appeals for the Seventh Circuit (R. 346) states:

> "The preferred stock committee raises a question of procedural error regarding the manner in which the Commission handled the original plan when the plan was referred back to it by the District Court. This appellant (petitioners) contends that under the requirements of subsections (d) and (e) of Section 77 of the Act, the Commission mandatorily is required to proceed as though this were an entirely new plan of reorganization. That is, the Commission must set a hearing date on any new plans of reorganization—one of which must be filed by the debtor, while others may be filed by the trustees, creditors and stockholders—but no plan may be considered until six months after the order referring the proceedings back to the Commission.

> "This appellant (petitioners) concedes that this is an entirely new matter which has never before been passed on in reorganization proceedings. The District Court in approving the modified plan overruled this objection but without explanation. We fail to find any merit in the objection. * *"

The District Court on June 3, 1943, entered an order approving the first plan of reorganization as modified by the debtor except as to two matters, and thereafter, on June 25, 1943, entered an order referring the proceedings back to the Commission for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act *and the opinion of the Court dated June* 3, 1943, and in addition for the Commission's determination in the first instance of certain matters recited in said order. Under the provisions of Section 77, Sub.(e), if the District Court shall not approve the plan the court has jurisdiction only to enter an order which may either (1) dismiss the proceedings, or (2) refer the proceedings back to the Commission for further action. The Court did not have the power to approve a portion of the plan and disapprove other portions. Subsection (e) specifically provides:

> "If the Judge shall not approve the plan he shall file an opinion stating his conclusions and the reason therefor and he shall enter an order in which he shall either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of Subsection (d) of this section."

The opinion of the Judge filed on June 3, 1943, in part, said (R. 297):

> "For the reasons heretofore given, the plan is not approved; and the court, on motion of any party in interest, will enter an order referring the proceeding back to the Commission for further action."

It is apparent that the Judge was proceeding under 11 U.S.C.A., Section 77, Sub. (e), second paragraph, when on June 25, 1943, the District Court entered the order (R. 300):

> "That the proceedings are referred back to the Commission pursuant to subsection (e) of Section 77 of the Bankruptcy Act for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act * * *."

Since the proceedings were referred back to the Commission under Section 77, Sub. (e) of the Bankruptcy Act, the Commission was bound to proceed under the following provisions found in the second paragraph of Sub. (e), namely: "If the proceedings are referred back to the Commission it shall proceed to a reconsideration of the proceedings under the provisions of Subsection (d) of this Section." This provision of the law is clear. It is mandatory. The Commission on the re-reference had no discretion as to how it would proceed. It was obligated to proceed to a reconsideration of the proceedings under the provisions of Subsection (d) of Section 77 of the Bankruptcy Act. That the Commission did not follow, and indeed refused to follow on its reconsideration of the proceedings, the provisions of Subsection (d) of Section 77 of the Bankruptcy Act is apparent from the following undisputed facts:

A. These petitioners, on August 30, 1943, which was after the proceedings had been re-referred to the Commission, filed their application (App. C, page 42) for, among other things, the entry of an order by the Interstate Commerce Commision that all proceedings before it pursuant to the order referring back the proceedings, be *de novo* under the provisions of Subsection (d) of Section 77 of

the Bankruptcy Act. The Commission, by its order of October 4, 1943, denied the aforesaid petition of these petitioners.

B. On November 20, 1943, these petitioners filed with the Interstate Commerce Commission their petition (App. D, page 55) wherein the Commission was petitioned to reconsider its order dated October 4, 1943, denying the petition filed with the Commission on September 1, 1943, asking for the entry of an order that all proceedings before the Commission pursuant to the order of re-reference be *de novo*. This petition was denied by the Commission.

C. On June 16, 1944, (which was after the Commission had certified to the District Court the modified plan of reorganization effective as of January 1, 1944) these petitioners filed with the District Court their objections to the modified plan (App. F, page 68). Those objections were, among other things:

> "1. The plan as modified is not based upon new findings subsequent to the re-reference to the Interstate Commerce Commission by the Court.
>
> "(a) On the re-reference the Commission denied the motion of the Committee that the proceedings on the re-reference be *de novo* under Subsection (d) of Section 77.
>
> "(b) On the re-reference the Commission refused to require the debtor to submit a new plan of reorganization and to permit parties in interest to file their respective plans of reorganization within a time to be fixed by the Commission.
>
> "(c) On the re-reference the Commission refused to permit the record before it to be brought down to date to show the financial condition of the debtor."
>
> "6. The plan as modified fails to give effect to the fact that the debtor is solvent and that one of the purposes of Section 77 of the Bankruptcy Act is to preserve the property of the debtor for its stockholders. (Title 11, Sec. 205(b)(3), U.S.C.A.) As of December

31, 1943, the grand total of assets of the debtor was $629,212,810.51, with the grand total of liabilities of the same amount. Included in the grand total of liabilities is total stock outstanding of $128,892,511.50, as well as 'total surplus (deficit)' of $63,086,292.06. By deducting this last surplus net deficit figure from the total stock of $128,892,511.50, the net capital position of the debtor is $65,816,219.44. The debtor is solvent in accordance with the statement of its Trustees as of the effective date of the modified plan in the amount of $65,816,219.44 in excess of its total liabilities. Therefore, the modified plan should have allocated said $65,816,219.44 to the present stockholders.

"The modified plan proposes a total capitalization of $356,117,329.00. The effect of that proposal is to deprive the present stockholders of their present equity of $65,816,219.44 and to give it as a bonus to the present creditors of the debtor."

D. The District Court erred in approving the modified plan of the Commission effective January 1, 1944, by the entry of its order of June 15, 1945, approving said plan, and ordered that:

"All objections to the plan are overruled."

It cannot be disputed that, on the reference back to the Commission, the following provision of Subsection (e) must control the proceedings of the Commission:

"If the procedings are referred back to the Commission it shall proceed to a reconsideration of the proceedings under the provisions of Subsection (d) of this section."

It therefore becomes necessary to consider the provisions of Subsection (d) of Section 77 of the Bankruptcy Act as to what the Commission on the re-reference was required to do in the proceedings then before it. The provisions of Subsection (d) are very specific.

Under Subsection (d), Section 77 of the Bankruptcy Act, the Commission, without discretion on its part and of its own motion, is mandatorily required to do three specific things before it can render a report and order approving a plan of reorganization:

First. It must set a hearing date on a plan of reorganization (but this it cannot do until six months shall have elapsed from the date of the entry of the order referring the proceedings back).

Second. It must require the debtor to file a plan of reorganization. (But it cannot require a new plan of reorganization to be filed by the debtor prior to the end of six months from the date of the order of reference back.)

Third. Within said six months period of time the Commission must afford parties of interest the opportunity of filing their respective new plans of reorganization.

Subsection (d) provides:

> "The debtor, after a petition is filed * * shall file a plan of reorganization within six months of the entry of the order by the Judge * * *. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be *prima facie* impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan.* * *"

The above quoted portion clearly means that on a reference back of a proceedings the Commission could not or-

der a hearing to be held before it in connection with a reorganization of a railroad until six months had elapsed from the date of the entry by the Court of the order of reference back; that during said six months interim the debtor is required to file its own new plan of reorganization; that during said six months interim other proper parties of interest must be permitted to file their respective new plans of reorganization; that after the end of said six months period the Commission must hold public hearings *on the submitted new plans of reorganization;* that the above specific steps are jurisdictional; and that unless the Commission followed such steps to the letter it had no jurisdiction to approve any plan of reorganization. The order of reference back was entered by the Court on June 25, 1943; the hearing by the Commission on the reference back was held September 1, 1943, which was less than six months from the date of the entry of the order of reference back (App. E, p. 66). It is immaterial that the Commission might have reached the same conclusion that it did in its order dated May 1, 1944, approving the plan of reorganization as of January 1, 1944, had it on the re-reference followed the specific directions of Subsection (d). The fact remains that it did not follow the directions of law as are specifically provided for in Subsection (d), Section 77 of the Bankruptcy Act. The Interstate Commerce Commission was created by Act of Congress. It has only such powers as are given to it by Acts of Congress, and Section 77 of the Bankruptcy Act, since it is mandatory, must be strictly adhered to by the Commission in the exercise of its jurisdiction.

That the Commission did not have a hearing *on new proposed plans of reorganization,* and therefore did not follow the directive provisions of Subsection (d), appears from the following paragraph of the Supplemental Re-

port of the Commission, Finance Docket 10028, submitted October 11, 1943, decided January 3, 1944, viz.:

> "In accordance with the provisions of Subsection (e) of Section 77, a further hearing for the purpose of receiving evidence *in respect of the matters specified in the Court's opinion and order was held before us on September* 1, 1943, and briefs have been filed." (App. E, page 67).

What the Commission did at its hearing September 1, 1943, (which was on a date less than six months from the date of the entry of the order of the Court, June 25, 1943, referring the proceedings back,) was to receive evidence *limited to the matters specified in the Court's opinion and order.* As we have heretofore pointed out, under Subsection (e), if the Court did not approve the plan or dismiss the proceedings the only power the District Court had under Subsection (e) was to refer the proceedings back to the Commission for further action under the provisions of Subsection (d) without instructions and without restrictions.

It is not the contention of these petitioners that on the re-reference the Commission was required to destroy or disregard the record of its proceedings prior to the re-reference of the proceedings to it, nor that the Commission be required to create a new record beginning with the inception date of the bankruptcy proceedings. Petitioners contend, however, that the Commission on the re-reference was required to bring its record down to date with additional evidence to determine the then financial condition of the debtor railroad. To ignore the marked improvement in the debtor's properties and earnings occurring in the years 1941, 1942 and 1943, and to approve a plan of reorganization modified only as suggested by the District Court, was arbitrary. It was not in obedience to legal standards.

It appears from the aforesaid Trustees' report of June 28, 1945, that the net income of the Rock Island after interest accrued was:

1941	$ 4,644,583.00
1942	22,234,225.00
1943	24,126,918.00
Total	51,005,726.00

This total of $51,005,726.00 was earned on par of $54,532,789.00. Preferred stock, or $93.53 per share for the period 1941-43 alone. This income the Commission refused to take into account when it approved the plan of reorganization.

1944	$13,140,092.00
1945	7,983,191.00*
Total	21,123,283.00

Added to this figure the net of 1941-43, $51,005,726.00, total $72,129,009.00, or an earnings for the period 1941-45 only of $132.26 per share on the Preferred stock.

A further illustration of the lack of any approximation of fair accuracy in the estimation by the Commission as to what the future earnings of the railroad would be is the amount of *cash* which the Government took from the *earnings* of the Rock Island in income taxes in:

*The 1945 net, after deduction for excess amortization of emergency road and equipment of $8,893,306 and does not include credit of $6,349,209.00 for railway tax accruals, an additional total of $15,242,515.00, which, when added to the net for the period 1941-45 shows a total net earnings of $87,371,524.00 which the Commission refused to take into consideration in its informed guess as to what the future earning power of the Rock Island would be.

1941	None
1942	$ 5,100,000.00
1943	21,100,000.00
1944	33,500,000.00
1945	18,644,239.00
Total	78,344,239.00
Less	6,349,209.00 (for railway tax accruals)
Net	$71,995,030.00

This tax total alone for the period 1941-45 approximates the earnings on the stock which the Commission in its approved plan says has no value and therefore wiped it out, and amounts to approximately $132.00 per share earnings on the Preferred stock. Certainly a plan which wipes out the stock of a railroad whose earnings in the so-called immediately forseeable years after the effective date of the plan were the above figures is not fair and equitable nor in obedience to legal standards.

II.

The plan of reorganization approved by the Commission, the District Court and the Circuit Court of Appeals is not "fair and equitable" nor in the "public interest" because:

The plan uses as the "normal" earning period the years 1936 and 1937. The Commission selected these two years as typical normal earning years, notwithstanding the fact that the earnings for said two years (1) averaged 66% of the average earnings of the debtor for the 5-year period from 1931 to 1935, inclusive, and (b) averaged 68% of the average earnings of the debtor for the entire depression decade of 1931 to 1940, inclusive. Included in this 10-year period is the year 1935, which is the only year in the debtor's history in which there was an operating deficit. If said year were eliminated from the 10-year period and

9 years of the depression decade were taken, the Commission's normal figure is approximately 61% of the said 9-year average net income. The selection of the years 1936 and 1937 as a normal period was arbitrary. Such selection was not fair and reasonable.

The following is taken from Report No. 432, filed August 6, 1946, by the Trustees of the Debtor with the District Court:

> **"1945 Results from Operation.**
>
> "Total Railway Operating Revenues of $192,046,910 of the Trust Estate for the *year* 1945 *were the largest of any year in the history of the Railway Company and exceeded by* $1,645,804 *the previous all time high revenue for the year* 1944. The record thus established was attributable principally to an immensely heavy volume of wartime freight which moved in unprecedented proportions until the termination of hostilities in Europe and taxed to the utmost the plant and equipment of the Railway.
>
> "Net income for the year (after deducting $18,644,-239 for Federal excess profits and income taxes payable in 1946) was $20,444,570, a decline of $5,971,349 under the year 1944. The income figure here stated is the net amount after the deduction of interest charges which are being paid by the Trust Estate and after a further deduction from income of $2,583,740 which was set up the Trustees as a reserve against possible refunds on Governmental shipments of war materials. However, the income in the amount stated is exclusive of deduction for interest on outstanding bonds of the Debtor Company, which interest, while included in the accounts of the Trust Estate, was not paid.
>
> "The decline in net income in contrast with the increase in revenue, as compared with the previous year, is due to abnormally high charges to operating expenses for amortization of the cost of wartime equipment and facilities and because of increased maintenance expenditures due to exceptionally heavy wear

and tear on the property during the war years, as well as higher prices paid for materials, fuels and supplies.

Comparison of Operating Performances.

"A comparison of expenditures for maintenance of way and structures, and maintenance of equipment, together with the ratios of those expenditures to total railway operating revenues, is shown by years, since Trusteeship, in the following tabulation:

Year	Maintenance of Way & Structures: Exclusive of Depreciation & Amortization Amount	Ratio	Maintenance of Equipment: Exclusive of Depreciation & Amortization Amount	Ratio
1933	$ 6,939,186	10.70	$ 9,214,074	14.21
1934	7,224,137	10.79	10,314,167	15.40
1935	8,325,661	12.41	10,637,856	15.85
1936	11,084,438	14.20	12,641,977	16.19
1937	12,095,893	14.82	11,477,950	14.06
1938	11,388,312	14.64	10,875,790	13.98
1939	12,228,011	15.58	10,423,553	13.28
1940	11,208,952	13.89	10,404,384	12.89
1941	12,544,942	12.94	11,587,205	11.95
1942	14,656,645	10.69	14,514,056	10.59
1943	17,590,571	9.96	18,634,428	10.55
1944	21,561,293	11.32	19,631,066	10.31
1945	27,190,040	14.16	20,917,036	10.89

"As reported to the Court in previous years' annual reports of the Trustees, because of very marked declines in the revenues of the Railway Company which commenced in 1930 and continued until 1936, expenditures for maintenance of way and structures and maintenance of equipment during the Trusteeship years from 1933 to 1936 were curtailed to the very minimum consistent with safety of operation. As a result thereof considerable deferred maintenance had accumulated on the property; however, with minor exception with relation to some bridge work, this has not only been eliminated but the property has been placed in sound physical condition with respect to both road and equipment.

"The increased expenditures for maintenance in the year 1945 were due, in addition to the higher costs of

wages and materials and the heavier volume of traffic, to a larger rail laying program and a continuation of the modernization and repair program with some greater degree of rapidity, which was made possible by some liberalization of critical materials. Further, the maintenance of way expenditure, as above stated, has included therein a charge of $1,784,542 for road retirements which represents the value of segments of road and facilities which were dismantled and retired from property investment accounts during the year. Excluding this charge the ratio of these expenses to total railway operating revenue would have been 13.23, rather than 14.16 as above stated.

"Notwithstanding the relatively higher maintenance expenditures in the year 1945, when considering the increased costs of labor and materials together with the aforementioned charge for retirements, these expenses were not disproportionate to the revenues. As may be noted from the foregoing tabulation, although the ratio of 13.23 for maintenance of way expenses (excluding retirement charges) exceeded the ratio of the four preceding years, it was not as high as any of the five years from 1936 to 1940; further, while the maintenance of equipment ratio of 10.89 was slightly in excess of the three preceding years, it was lower than that of the nine years from 1933 to 1941, inclusive.

Total Railway Operating Revenues, Expenses, Taxes and Net Railway Operating Income.

"The total railway operating revenues, transportation expenses, total railway operating expenses, tax accruals and net railway operating income, the ratios of transportation expense and total operating expenses to total railway operating revenues, and the net railway operating income percentage of total railway operating revenues, for the period of Trusteeship—by years—are shown in the following tabulation:

ear	Total Railway Operating Revenues	Transportation Expense	Total Railway Operating Expense	Total Tax Accruals	Net Railway Operating Income	Ratio of Expenses to Total Revenues: Transportation	Ratio of Expenses to Total Revenues: Total Operating Expense	% of Net Ry Operatir Income to Tota Operatir Revenu
...$	64,848,448	$25,473,853	$ 52,435,395	$ 5,340,000	$ 2,997,566	39.28	80.86	4.62
...	66,961,688	27,386,236	56,875,189	4,355,000	1,678,800	40.90	84.94	2.51
...	67,116,854	29,278,539	59,830,490	4,160,000	939,198-D	43.62	89.14	Deficit
...	78,066,706	32,058,560	67,401,773	5,611,294	1,000,681	41.07	86.34	1.28
...	81,643,250	33,478,140	68,510,802	4,334,922	4,458,707	41.01	83.91	5.46
...	77,777,807	31,442,862	64,867,059	5,739,903	2,512,843	40.43	83.40	3.23
...	78,467,818	29,757,491	63,009,282	5,507,432	5,458,853	37.92	80.30	6.96
...	80,701,923	29,935,633	62,391,445	5,568,230	8,133,477	37.09	77.31	10.08
...	96,962,499	33,300,975	69,105,057	5,860,230	17,616,382	34.34	71.27	18.17
...	137,067,138	41,367,119	84,589,244	11,465,449	36,557,111	30.18	61.71	26.67
..	176,644,686	50,549,136	104,975,106	29,090,642	36,794,983	28.62	59.43	20.83
..	190,401,107	54,206,129	115,477,735	41,931,631	26,079,690	28.47	60.65	13.70
..	192,046,910	57,751,635	136,084,801	27,043,267	22,195,944	30.07	70.86	11.56

D—Denotes Deficit.

"Total operating expenses for the year 1945 were increased to the extent of $9,977,735 by reason of substantially larger accruals for amortization of the cost of wartime facilities and equipment, as well as increased accruals for depreciation of roadway and structures.

"Pursuant to a proclamation by the President of the United States terminating the war emergency period on September 30, 1945, the Trustees elected to fully amortize as of that date the unamortized balance of the cost of emergency wartime facilities and equipment which were constructed or acquired prior thereto and which, in prior years, were being amortized over a sixty-month period from the date of acquisition. Accordingly, amortization accruals in the year 1945, by reason of the shortened period and because of the full amortization as of September 30th of war emergency equipment and facilities acquired in that year prior to said date, aggregated $12,242,257, or an increase of $9,703,470 over the amortization accruals for the previous year. By reason of these accelerated amortization charges there was a reduction of $6,349,209 in Federal excess profits and income tax liability of the Trust Estate.

"Emergency wartime facilities, both road and equipment, constructed or acquired subsequent to September 30, 1945, are being amortized over a sixty-month period.

"The transportation expense of $57,751,635 for the year 1945 increased in an amount of $3,545,505 over the previous year *due to the larger volume of freight traffic* as well as increased payrolls, higher prices of fuels and supplies and adjustments in the current year's accounts of casualty expenses incurred in previous years.

"The transportation ratio of 30.07 for 1945, although slightly in excess of either of the two previous years, *is lower than any of the other years in the railroad's history.* The total operating ratio of 70.86 was increased to the extent of 5.16 points due to the excess of accruals for depreciation and amortization in 1945 over 1944, as previously referred to herein.

"As a result of the increase in operating expenses in 1945 which, as previously stated, were brought about principally by reason of extraordinarily large amortization accruals, the net railway operating income of $22,195,944 for the year was lower than any of the three preceding wartime years, *but considerably in excess of any other year since* 1929."

The above and foregoing report of the trustees refutes any contention that the plan of reorganization of the debtor is "fair and equitable" and in the "public interest." Section 77 of the Bankruptcy Act was intended by the Congress of the United States to be used as a vehicle for the relief of debtors and not for the extinguishment of debtors. Notwithstanding previous decisions to the contrary, it is urged that it is the duty of the Commission and of the courts to approve such a plan as will relieve the debtor and not extinguish it. Section 77 clearly means that the equities of the stockholders of the debtor should not be extinguished, but that due recognition of the rights of stockholders must be provided for in any plan of reorganization so that the

plan does not discriminate unfairly against any class of stockholders, particularly so when the debtor railroad corporation (as is the case here) is not insolvent. This conclusion follows inescapably from the requirement under Subsection (e) of Section 77 that the plan shall be "• • • fair and equitable and afford due recognition to each class of creditors and stockholders."

It is apparent when examination is made of the hearings before the Committee on Interstate Commerce, United States Senate, 79th Congress, Second Session, on S-1253, "A bill to amend the Interstate Commerce Act, as amended, and for other purposes," which relates to the modification of railroad financial structures, and the printed report of said hearings for the use of the Committee on Interstate Commerce, that the Commission knows that in some of its approved plans for railroad reorganizations, including the Rock Island, grave injustices have been done to stockholders of the railroads. At page 515 of Part 2 of the printed report for the use of the Committee on Interstate Commerce there appears the following:

> "Mr. Mahaffie (member of the I. C. C.): In general, as indicated above, dissatisfaction with the limits of capitalization stems from the increase in earnings and in cash resources as a result of war earnings in recent years. These increased earnings accrued for the most part after the records on which the Commission's plans were based had been closed. These changed conditions have been urged as a basis on which the plans, formulated before they occurred, should be revised. The Commission has considered that after a plan has been certified by it to the court having jurisdiction, the question whether conditions had so changed as to require its resubmission with a view to possible revision is one for the court. And that the court's determination is wholly a matter of judicial discretion. Consequently the Commission has felt that it should not volunteer advice to the courts in that regard. • • •

"The Chairman: It does seem that where the Commission knows in some of these instances there has been grave injustice done to some of these people and security holders have been wiped out, it does seem to me the Commission should have taken some action. While I can readily appreciate that the Commission might hesitate somewhat to ask the Court to return the plan, some courts possibly might resent it, nevertheless I think I would have taken a chance on it if I had been in the position of the Commission. On the other hand, you may have had a situation where the courts were reluctant to send a plan back to the Commission—for fear they would offend the Commission—and the Commission refusing to ask to have the plan sent back for fear they would offend the court. In the meantime some of these securities were wiped out of existence. I just don't believe that the Commission on the one hand or the courts on the other hand, when an injustice is being done, should stand upon the question of mere fear that they are perhaps going to offend each other."

It is clear that it is the Congressional intention that the relations between the Commission and the courts should not be alien to each other, but that when either the Commission or the court knows that a grave injustice has been done neither the Commission nor the court should stand upon the question of whether or not the other will be offended. When the court from its judicial knowledge and judicial notice knows that such grave injustices have been done, as is the case of this debtor, the court should not hesitate to send the entire subject matter back to the Commission.

At page 519 of said printed report to the Committee on Interstate Commerce there appears the following:

"Excerpt from the testimony of Mr. Mahaffie, member of the Commission:

"I am ready to state that there may be need for revision in individual cases—those records were closed, some of them, some years ago. There have since been very great changes in cash resources. To some extent debt retirement may also be important. There is the possibility of a need for revision of some of the plans that are pending and not yet in effect.

"A thing that you, Mr. Chairman, have discussed a time or two, is the fact that there have been authorized 4 percent first mortgage bonds. At the time we authorized them there was usually a question whether that rate was really sufficient to satisfy the claim. This because the recipient could not expect to get par for them or to anticipate that figure in the reasonably foreseeable future. • • •

"The changes in credit conditions have now made those 4 percent first mortgage bonds of the roads that are covered by section 20(c) such that they generally can be readily refunded when the property is back in solvent condition. If they can be refunded at, say, 3 percent, that of itself, as Mr. Purcell indicated, affords a basis for an increase in capitalization, because the total of the fixed charges is one of the important elements in fixing capitalization. That and other changed conditions in these cases I think probably should have consideration where they can be shown to have changed to an important extent. It was with that in mind that I said if you are convinced as I think you might well be, that these changed conditions should be looked into and evaluated, you might like, by statute, to send the proceedings in which you find them *back for further consideration* (italics ours). • • • It is not in accord with the recommendation I have just been making to the committee, that there be no suspension, but that you require the plans in those cases where you find injustice threatened to come back."

In its report No. 1838, dated April 2, 1946, 79th Congress, 2nd Session, House of Representatives, Report of the Com-

mittee on the Judiciary, to whom was referred the Bill (H.R. 5924) to enable debtor railroad corporations whose properties during a period of 7 years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structure without further proceedings under Section 77 of the Bankruptcy Act, as amended, the Committee on the Judiciary, at page 4, said:

> "Comparatively few roads have emerged from reorganization under Section 77, for it provides no adequate, effective, simple formula for getting railroads out of proceedings thereunder, even though a road has become wholly solvent through increased earnings and enhanced assets."

And at page 5, said:

> "The bill herein reported (H.R. 5924) would eliminate the Interstate Commerce Commission from the determination of solvency and the release of railroads from bankruptcy by placing that determination in the courts under a simple, sound standard—their record of actual earnings during the preceding 7 years. * * * These railroads have demonstrated their solvency, even in bankruptcy. * * * The Chicago, Rock Island and Pacific earned all its fixed charges during the same years and an additional $38,000,000. * * *"

Since the Interstate Commerce Commission has officially recognized that there are changed conditions affecting the debtor, and that these changed conditions should now have consideration by the Commission, that these changed conditions should be looked into and evaluated, this Court should grant this petition for certiorari and should refuse to approve the plan and should send the proceedings back to the Commission for further consideration, including the proposal of new plans.

The plan, in using the years 1936 and 1937 as the "normal earning period" disregards the much greater substan-

tial earnings of the debtor beginning with the year 1940 and through 1946 to date than was the guess of the Commission. The plan disregards entirely the unanticipated fact that income taxes for corporations were substantially reduced effective January 1, 1946, which will result in a larger unanticipated net earnings. As was said by this Court in the *Denver & Rio Grande Western Railway Co., et al.,* reorganization proceedings, October Term, 1945, Nos. 278 to 282, both inclusive, "Reasons to make their rejection reasonable may arise thereafter. For example, unanticipated large earnings might develop * * *." Since, as is shown by the quoted portions of the trustees' report to the District Court aforesaid, not only have there been exceptionally large unanticipated earnings, but due to the improvements of the railroad facilities, still greater unanticipated earnings will result therefrom. This case is one in which a petition for certiorari should be granted and ultimately the plan of reorganization returned to the Commission, disapproved, and for further action by the Commission under the applicable provisions of law. Certainly, as this Court said in the *Denver & Rio Grande Western Railway Co., et al.,* there is no requirement that in a plan of reorganization of a railroad anyone be required to sacrifice his interest to create a depression-proof railroad.

III.

The plan of reorganization is in conflict between the Congress of the United States and the President on the one side and the Interstate Commerce Commission on the other as to the meaning of the words "fair and equitable" and "public interest." The Senate and the House of Representatives, in both cases by more than a two-thirds vote, adopted a conference report, a copy of which is hereto

annexed and made a part hereof, marked Appendix "G". This conference report was adopted on July 31, 1946, and the bill embodied therein, finally designated as S. 1253, was presented to the President of the United States on August 1, 1946. On August 13, 1946, Congress adjourned, and by their adjournment prevented a return of the bill with a Presidential veto and subsequent consideration by the House and Senate of Presidential disapproval. The President did not sign the bill and it did not become a law, but on August 13, 1946, the President released his memorandum stating the reasons why he was withholding his approval. A copy of this memorandum is hereto annexed and made a part hereof, marked Appendix "H". From this memorandum it appears clearly that the President's signing of S. 1253 was withheld for the reason that in his opinion the bill did not go far enough in issuing protection to stockholders' and general creditors' interests from the confiscation of their investments under plans of reorganization.

Implicit in the language of the President's memorandum expressing his agreement with certain definite objectives of the bill was the clear affirmation that current Section 77 plans of reorganization are not "fair and equitable" and in the "public interest." From the reports of the Senate Committee on Interstate Commerce in support of S. 1253, and the reports of the Judiciary Committee of the House in support of H.R. 5924 and the earlier reports of the same Committee in support of the earlier H.R.-37 (Hobbs Bill*) it is also manifest that Congress is unwilling to accept as the correct interpretation of Section 77 of the Bankruptcy

*Report No. 1615-H. R., 78th Congress, 2nd Session, on H. R. 4960 is substantially identical with Report No. 48-H. R., 79th Congress, 1st Session, H.R.-37. There is an additional report of the same Judiciary Committee numbered 1838 of the 79th Congress, 2nd Session, to accompany H.R. 5924.

Act the interpretation placed thereon by the Interstate Commerce Commission. This Court in its reorganization decisions has refused to disturb that interpretation. The key words of Section 77 are "fair and equitable" and "public interest." There is a definite conflict between the Congress and the President on one side and the Interstate Commerce Commission on the other as to the meaning of these words and the discretion given to the Commission by them. The meaning anticipated by Congress and the President would not permit the Rock Island plan, or any plan like it. The Interstate Commerce Commission, which is an arm of Congress, to exercise its legislative powers, claims power under Section 77 which Congress, the author of its existence, says it has not given to it. The Congress has said this not alone by Committee reports but by the overwhelmng vote of both houses.

This Court, in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific RR. Co.*, 318 U. S. 523 (page 547), resorted to a report of the House Judiciary Committee in the 77th Congress as relevant and entitled to cognizance in construing Section 77, which was passed by the 74th Congress. Resort should now be had (a) to separate reports of standing committees of both Houses of Congress; (b) to the affirmative votes of the large majorities of the Senate and the House; and (c) to the informed judgment of the President of the United States who himself was a member of the Senate and its Committee on Interstate Commerce at the time Section 77 was enacted. These reports and acts furnish convincing evidence that Congress did not intend the result which has been reached in the Rock Island plan. It can be fairly asserted that the purpose of the Act as defined by this Court in *Continental National Bank* v. *Rock Island*, 294 U. S. 698, had it been adhered to, would present "fair and equitable" plans in

the "public interest" without the necessity of further corrective legislation.

A "fair and equitable" adjustment of the interests of private investors was an object of S. 1253 no less important than the concurrent object to protect the "public interest." Subsection (g) of Section 77 calls for a recognition of changed conditions *pendente lite* to the end that the proceedings may be dismissed. The plenary power to dismiss controls the power to condition dismissal. An obvious condition would be to require a reexamination of the plan by the Commission and the court in order that the changed conditions might be given effect.

We have referred to the legislative record which we contend marks a fundamental change in the administrative standards by which the Commission should be guided in formulating a plan. It should not forfeit stock investments as it has done in the Rock Island plan. It should recognize a change in the market for the hire of money. Furthermore, the bankruptcy court should permit the use of assets to alter and strengthen the financial structure as a precedent condition to the formulation of a final plan. The assets of the Rock Island have greatly increased during the Court's administration of the properties. No longer is its equipment obsolete. It has been completely modernized, and because of the lessening of operating overhead costs, due to its modernization, the Rock Island will continue to return a greater net earnings on its operations than heretofore. None of the essentials of a "fair and equitable" plan has been observed in the formulation of the plan of reorganization by the Commission.

The Commission has tried to fit the plan to assumed future economic conditions in the United States which have

in fact developed materially different from the assumption. The unprecedented volume of national business and the consequent demand for railroad service is the governing factor in the change. This wholly unexpected volume has continued since V-J day, and the demand for railroad service is constantly increasing. This the Commission in its informed guess totally ignored. The unpredicted gross income of the Rock Island is of course the natural accompaniment of the unpredicted national volume of business. In response to natural laws the net in other business activities is rising with the gross. The Rock Island has of course had increased operation cost reducing its net earnings (as is shown in the trustees' report from which we have heretofore quoted, due to wage increases, etc.), but the Rock Island net will follow upward the increased gross when the Commission sees fit to make adjustment in tariff rates according to the higher labor and material costs in line with adjustments in the national economy. When this is done there will inevitably be net earnings of the Rock Island proportionate to the increase in the volume of business it does and the service it renders. There is no justice in a forecast that national prosperity will not be reflected in railroad prosperity as soon as natural adjustments between costs and tariff rates are made by the Commission.

A major change in the Nation's economy is in the rate of interest for borrowed money. This change was fully commented upon in Congress and emphasized by the President. The Rock Island plan is based on obsolete interest rates, unfair and inequitable since a new plan could readily be devised which would make creditors whole through the issue of new bonds bearing interest at very substantially lower rates than provided for in the existing plan and thereby effect a large savings to pass down to stockholders, thus averting stock forfeiture. This major change in the

Nation's economy alone requires the granting of this petition for a writ of certiorari and the rejection of the current Rock Island plan and a reconsideration of the plan by the Commission.

We have been met with the argument that speed in the consummation of railroad reorganization plans was and is of major public interest. The reason for delay in these reorganization plans is that they have worked so that those, including petitioners, whose properties have been expropriated have had no feeling that their rights and equities have at any time been fairly considered and decided. It is the conviction that certain classes of creditors have been permitted to over reach stockholders; that because of so many novel practices which the Commission has adopted and which the courts have approved that at no time have stockholders had the sound, judicial deliberation and consideration of their rights and equities which American citizens, including private investors, are accustomed to have. If stockholders have been wronged, as is the fact in this case, there is no theory of jurisprudence which justifies denial of their rights in the name of speed. As a matter of fact, "speed" of itself in the end of litigation, which is so often urged, has no application. Delay is in the public interest if its object is to prevent injustice. The repeated assertion that the public interest requires that railroads be taken out of the hands of the Court is not founded on any real substantial consideration. *The public interest is to have transportation service.* It is common knowledge that all income that it has been possible to spend on the railroads in the hands of the courts has been so spent and that the service to the public which these railroads give has never been better. The reasons why creditors who are given the entire property are anxious to get the property from the jeopardy of a court which still has power to do equity can

be very easily and well understood. There is and can be no public interest involved in the wholly private anxiety of the creditors who have been given the entire railroad properties. Not only do these creditors receive compensation in full for the dollars which they invested in railroad securities, but they get the entire railroad property in addition. The real public interest is that the powers given the Commission in Section 77 be administered in accordance with its plain provisions. Appended is Appendix "I", which is a declaration of members of the House and Senate Conference Committee of their decision to press for legislation at the next session of Congress. There should be no doubt but that the Congress intends to reaffirm its conclusion that railroad properties should be conserved for the benefit of the debtor and its stockholders who are private investors as a matter of public interest and that the President intends to cooperate. Since it is obvious that the situation in which the views of the President and Congress as to what is "fair and equitable" and in the "public interest," both of which were supposed to be attainable and directed under Section 77 differ from the views of the Commission, a creature of the Congress as set forth in its approved Plan of Reorganization of the Rock Island, this petition should be granted and ultimately the plan should be returned to the Commission disapproved and for further proceedings.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit directing that Court to certify and send to this Court for its review and determination on the day to be named therein a transcript of the record and the proceedings herein; that the judgment

of said Circuit Court be reversed; and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Chicago, Illinois, September 19th, 1946.

Respectfully,

CARTER H. HARRISON, JR., STEPHEN V. R. CROSBY, CHARLES F. GREY AND GEORGE E. PIKE, as the Protective Committee for The Chicago Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

By LOY N. McINTOSH,
135 South LaSalle Street,
Chicago Illinois.

GANN, SECORD, STEAD AND McINTOSH
Of Counsel.

APPENDIX (A)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

June 20, 1946

Before

Hon. Otto Kerner, Circuit Judge
Hon. Sherman Minton, Circuit Judge
Hon. Walter C. Lindley, District Judge.

In the Matter of: Chicago, Rock Island & Pacific Railway Co., Debtor.

No. 8929 Carter H. Harrison, Jr., Et & 8938 Al., Etc.
and
Gerald Axelrod, Et Al., Etc.
Appellants,

vs.

Joseph B. Fleming & Aaron Colnon, As Trustees of the Chicago, Rock Island & Pacific Railway Co.,
Appellees.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petitions for a rehearing of these causes be, and the same are hereby, denied.

A True Copy

TESTE

Kenneth J. Carrick
Clerk, United States Circuit Court
of Appeals for the Seventh Circuit.

APPENDIX (B)

The Bankruptcy Act, as amended:

Section 24(c). The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. (11 U. S. C. A. section 47(c).)

Section 73. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 202, 203 and 205 of this chapter.

Section 77(b). A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities or of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include for the purpose of preserving such interests of creditors and stockholders as are now otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest or funded debt, interest or unfunded debt, amortization of discount on funded debt, and rent for leased railroads)

in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings, experience, and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section. (11 U.S.C.A. section 205(b).)

Section 77(d). The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown,

no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be comparable with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved

by the Commission and certified to the court. (11 U.S.C.A. section 205(d).)

Section 77(e). Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) it complies with the provision of subsection (b) of this section, if fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors of stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities pro-

vided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. * * *"

APPENDIX (C)

IN THE
DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division

In Proceedings for the Reorganization of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Debtor.	No. 53,209

Before The
INTERSTATE COMMERCE COMMISSION

In the Matter of THE REORGANIZATION OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Debtor.	Finance Docket No. 10028

Application of Protective Committee for the Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock

For

A. The entry of an order by the Interstate Commerce Commission that all proceedings before it pursuant to

the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, among other things referring back to the Commission the proceedings for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act, be *de novo* under the provisions of Subsection D of Section 77 of the Bankruptcy Act, except that the Commission by its order specify the date on or before which the debtor shall file a Plan of Reorganization and within which time other proper parties in interest may file their respective Plans of Reorganization.

B. The entry of an order by the Interstate Commerce Commission that all Plans of Reorganization shall contain provisions authorizing the trustees of the estate of the debtor to

(1) Pay bank loans at par or a discount from par principal,

(2) Pay the Reconstruction Finance Corporation loan at par or a discount from par principal,

(3) Use available cash of the estate of the debtor on tender for the purpose of discharging the claims of the creditors of the debtor at par or a discount from par principal,

that in all respects each Plan of Reorganization shall comply with the provisions of Subsection B of Section 77 of the Bankruptcy Act, that all such plans shall be fair and equitable, shall afford due recognition to the rights of each class of creditor and stockholder, shall not discriminate unfairly in favor of any class of creditors or stockholders and shall conform to the requirements of the law of the land respecting the participation of the various classes of creditors and stockholders.

Now come applicants Carter H. Harrison, Jr., Stephen V. H. Crosby, Charles F. Grey and George E. Pike as the

Protective Committee for the Chicago, Rock Island and Pacific Railway Company 7% and 6% preferred stock on behalf of the holders of said preferred stock represented by them and all other holders of said preferred stock similarly situated who may desire to join in this petition and respectfully state:

1. That on June 3, 1943, the District Court of the United States for the Northern District of Illinois, Eastern Division, rendered an opinion on the Rock Island Reorganization Plan theretofore certified by the Commission to said District Court and stated in conclusion,

> "For the reasons heretofore given, the Plan is not approved; and the court on motion of any party in interest will enter an order referring the proceedings back to the Commission for further action."

2. That on June 25, 1943, the said District Court entered an order, No. 279 directing

> "That the proceedings are referred back to the Commission pursuant to Subsection E of Section 77 of the Bankruptcy Act for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act * * * "

The said order also provided

> "For determination in the first instance of the distribution among creditors in accordance with the allocations of new securities made in the plan as it may hereafter be amended by the Commission and in addition thereto, of the cash available for such distribution on December 31, 1943, and for other adjustments in the allocations of new securities and the terms of the Plan (including reallocation of new securities which may be released in special cases by cash distributions) which the Commission may deem appropriate * * * "

3. It is contended that under Subsection E, Section 77 of the Bankruptcy Act if the Judge shall not approve the

Plan the court has jurisdiction to enter an order which may either

(a) Dismiss the proceedings, or

(b) Refer the proceedings back to the Commission without any restrictions for further action.

4. It is further contended that the only valid portion of the order entered by the court on June 25, 1943, referring the Plan back to the Commission is, namely, "that the proceedings are referred back to the Commission pursuant to Subsection E under Section 77 of the Bankruptcy Act for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act." That all other provisions of said order are invalid pursuant to the following provision of Subsection E of Section 77 of the Bankruptcy Act

> "If the Judge shall not confirm the Plan he shall file an opinion with a statement of his conclusions and his reasons therefor and enter an order in which he shall either dismiss the proceedings or in his discretion and on motion of any party in interest refer the case back to the Commission for further proceedings, including the consideration of modifications of the Plan or the proposal of new Plans. In the event of such a reference back to the Commission the proceedings with respect to any modified or new Plans shall be governed by the provisions of this section in like manner as in an original proceeding hereunder."

5. It is further contended that under the provisions of Subsection E of Section 77 of the Bankruptcy Act,

> "If the proceedings are referred back to the commission it shall proceed to a reconsideration of the proceedings under the provisions of Subsection D of this Section."

the proceedings before the Commission on a reference back to it must be *de novo,* since Subsection D provides:

> "The debtor, after a petition is filed as provided in Subsection A of this Section, *shall file a Plan of Reorganization* within six months of the entry of the order by the Judge approving the petition as properly filed * * * Such plans may likewise be filed at any time before or with the consent of the Commission during the hearings hereinafter provided for by the trustee or trustees or by or on behalf of the creditors, being not less than ten per cent in amount of any class of creditors or by or on behalf of any class of stockholders, being not less than ten per cent in amount of any such class or with the consent of the Commission by any party in interest. After the filing of such a plan the Commission, unless such Plan shall be considered to be *prima facie* impracticable, shall after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings at which opportunity shall be given to any interested party to be heard and following which the Commission shall render a report and order in which it shall approve a Plan which may be different from any which has been proposed that will in its opinion meet with the requirements of Subsections B and E of this Section and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any Plan * * *."

It is contended that the debtor must file a Plan of Reorganization. Subsection D does not provide within which time the debtor shall file a Plan of Reorganization after an order has been entered by the court referring the proceedings back to the Commission. Therefore, since Subsection D provides that

> "Such plans may likewise be filed at any time before or with the consent of the Commission during the hearings hereinafter provided for * * *."

the Commission is vested with jurisdiction to direct within what time the debtor shall file a plan of reorganization after the court order referring the proceedings back to the Commission.

6. It is, therefore, hereby respectfully moved that the Commission enter an order

(a) Directing that all proceedings before it pursuant to the order referring the proceedings back to it shall be *de novo;*

(b) Directing that the debtor shall file a Plan of Reorganization within such time as may be fixed by the Commission; and

(c) Directing that all other proper parties in interest be permitted to file their respective Plans of Reorganization within such time as may be fixed by the Commission.

7. In view of the fact that Mr. M. L. Bell, who for years has been general counsel of Chicago, Rock Island and Pacific Railway Company, during the month of June, 1943, resigned as counsel for the debtor because of the position taken by the debtor's trustees that he should no longer act as general counsel for the Chicago, Rock Island and Pacific Railway Company and for the debtor (in which position of the trustees for the debtor your applicants do not concur,) it is suggested that inasmuch as the Board of Directors of The Chicago, Rock Island and Pacific Railway Company did not until, a few days ago employ Mr. John Gerdes of Gerdes & Montgomery, 1 Wall Street, New York, as counsel for the debtor, the time within which the debtor shall be directed to file its Plan of Reorganization shall be not less than six months from the date of the entry of such an order by the Commission.

8. By Subsection B of Section 77 of the Bankruptcy Act a Plan of Reorganization as provided for within the meaning of this Section

"(1) Shall include provisions modifying or altering the rights of creditors generally or any class of them, secured or unsecured, either through the issue

of new securities of any character or otherwise;

"(2) May include provisions modifying or altering the rights of stockholders generally or any class of them either through the issuance of new securities of any character or otherwise;

"(3) May include for the purpose of *preserving* such interests of creditors and *stockholders* as are not otherwise provided for provisions for the issuance to any such creditor or *stockholder* of options or warrants to receive or to subscribe for securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan * * * ."

9. Subsection E of Section 77 provides:

"Upon the certification of a plan by the Commission to the court * * * the Judge shall after notice, hear all parties in interest in support of and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing * * * the Judge shall approve the Plan if satisfied that it complies with the provisions of Subsection B of this section, is fair and equitable, *affords due recognition to the rights of each class of creditors and stockholders,* does not discriminate unfairly in favor of any class of creditors or stockholders * * * ."

10. The Commission will have before it the earning records of the debtor and its full and complete financial statements, therefore, no discussion of those figures will be had in this application. However, in view of the present substantial cash position of the debtor, the present low market prices of the outstanding obligations of the trust estate should be availed of which would necessarily result in a substantial reduction in the indebtedness to be provided for under the Plans which should now be submitted to the Commission. When the original Plan was drawn, which was certified by the Commission to the court, the debtor had cash of between Five and Six Million Dollars. The trustees estimated cash position of the debtor

at the end of 1943 is a total of $94,783,131. It is as important to save the investment of the preferred and common stockholders as it is that of the banks, bond, certificate and other security holders. It was not intended that the debtor should be extinguished. The statute was passed for the relief of debtors. While there is to be recognized the distinction between the equity of the corporation and its stockholders, there is in equity, however, no real distinction between the corporate entity and its stockholder insofar as preservation of the property of the debtor is concerned. The Commission should now give consideration to the present facts of earnings of the debtor. It should determine as a matter of public interest whether there is now a reasonable probability that the earning power of the debtor based upon present known earning facts and an estimate of probable future earnings, will be sufficient to pay prior claims and leave some surplus of the debtor for the stockholders. It is urged that as the United States Supreme Court said in the Milwaukee and Western Pacific Railway cases, the Commission should base the valuation for the purpose of reorganization upon the probable future earnings of the debtor. In so doing the depression years should not be considered as a criterion in determining what the probable future earnings of the debtor will be. The Commission is fully advised of the fact that with the manufacturing facilities now converted (insofar as durable goods are concerned) into war production the shortage of commercial goods due to current consumption is increasing daily. The Commission is aware of the fact that because of the reduced tonnage of freight carried by truck, freight traffic on the railroads has greatly increased without taking into consideration war traffic. The railroads are not dependent upon rubber as are trucks for freight transportation. The Commission will not overlook the fact that the rubber producing plantations not destroyed by war or in

possession of the enemy, according to releases of the Executive Department, are not and will not be sufficient for many years to come to supply the demands for rubber to enable trucks to compete for freight and passenger transportation. To counteract the competitive condition between freight and passenger trucks and the railroads for the past decade, during the continuance of the war and for many years thereafter (based upon the years' experience following the first World War) the railroads, and among them the debtor, will without doubt have very substantial net earnings due to the fact that with the cessation of hostilities:

(a) War torn countries must be rehabilitated by American production, and, (b) The resumption of manufacture of the depleted supply of durable goods in this country will of necessity be transported by the railroads, including the debtor, from the points of manufacture to the point of consumption and to the port of embarkation. With the railroads carrying the big bulk of the freight and passenger transportation (due principally to the fact that they are not dependent upon rubber as are trucks and secondly, to the fact that it will take an extended period of time for the truck manufacturers to build, finance and deliver trucks in quantities sufficient to divert any substantial freight and passenger traffic from the railroads—this, notwithstanding the fact that some progress is being made in the production of synthetic rubber—for rubber plantations destroyed cannot be brought back into production by mushroom growth) the position of the Rock Island Railroad clearly demonstrates that its probable future earnings for many years to come will not be substantially less than its record of earnings for the year 1942 and for the first seven months of 1943.

The performance of the debtor has been markedly superior to the anticipation of the Commission in three re-

spects when it approved the Plan certified by it heretofore to the Judge, namely:

(a) Actual gross earnings have been much higher,

(b) Actual net earnings have been much higher,

(c) Relative net earnings have been materially higher than any predicted level of gross.

The Commission should not ignore the events which have taken place subsequent to its certification of the original Plan. To do so would be to deprive the stockholders of the debtor of all benefit of such beneficial subsequent events. These subsequent events, insofar as the debtor is concerned, comprises the general improvement in the debtor's technique and enormous increase in efficiency in operation due to the completed improvement program of the debtor (which was done by court approval) and which has resulted in exceptional earning records of the debtor, as its financial statements will clearly demonstrate to the Commission.

11. It is, therefore, urged and your petitioners hereby pray that the Commission direct that all Plans for Reorganization submitted, provide for authority in the trustees of the estate of the debtor to use available cash of the estate on tender for the purpose of discharging the claims of the creditors of the debtor at a discount from par principal. This should include the banks, the Reconstruction Finance Corporation and all other creditors.

12. One of the banks, namely, the Continental Illinois National Bank and Trust Company of Chicago, in support of its petition to have vacated the injunction order entered by the court on November 22, 1933, restraining disposition of collateral security, stated on Pages 6 and 7 of its said brief:

> "On April 15, 1943, the total claim of petitioner, including principal of $995,323.53 and interest of

> $539,428.02, amounted to $1,534,751.55. On the same date the market value of the collateral held by the Bank as security amounted to only $1,091,015.00. It is thus apparent that, contrary to the conditions existing when the injunction was issued, with the collateral substantially in excess of the amount of the loan, on April 15, 1943, the value of the collateral was considerably less than the amount of the loan. Consequently, instead of the debtor having a substantial equity, there is none, and, instead of the petitioner having a comfortable margin against loss it is definitely confronted with a loss.
>
> "It is to be noted that this petitioner, in its application for a vacation of the injunction order, specifically avers that ' * * * if permitted to dispose of the said collateral pursuant to the terms of the pledge, this petitioner will make no claim against the estate of the debtor for any deficiency which will result from the disposition of the collateral.' "

Since a part of the consideration for the motion to vacate said injunction order was the agreement on the part of the bank that it would settle its claim for less than par principal and would take a loss, Plans of Reorganization should provide for the settlement of the claims of the banks at less than par principal.

13. The Reconstruction Finance Corporation should not be paid in full its principal claim (notwithstanding the fact that it is a corporation owned by the United States), because it is not entitled by Section 77 of the Bankruptcy Act to any preference over other creditors. Subsection E of Section 77 specifically provides that

> "The Judge shall approve the Plan if satisfied that it is fair and equitable and affords due recognition to each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stock holders * * * ."

Therefore, all plans of Reorganization should provide for the settlement of the claim of the Reconstruction Finance Corporation at less than par principal.

14. Since Section 77 of the Bankruptcy Act was passed for the relief of debtors and not for the extinguishment of debtors, it is the duty of the Commission and of the court to approve such a plan that will relieve the debtor and not extinguish it. This clearly means that the equities of the stockholders of the debtor should not be extinguished in whole, but that due recognition to the rights of the stockholders must be provided for in any Plan of Reorganization so that the Plan does not discriminate unfairly against any class of stockholders (Subsection E, Section 77). To the end of treating the stockholders by class fairly, it is urged and it is hereby prayed, that the Commission direct that all Plans for Reorganization of the debtor now to be submitted specifically provide that the trustees of the estate of the debtor be permitted to use available cash of the estate of the debtor on tender for the purpose of discharging the claims of creditors at a discount from par principal. This procedure has been followed in equity proceedings and if availed of in these proceedings will undoubtedly result in the discharge of a substantial portion of the debts of the debtor at substantial savings, which together with the present earning and the prospective earning capacity of the debtor will result in a substantial relief to the debtor, not its extinguishment, and with the resultant preservation of some equity for the present stockholders of the debtor.

Wherefore, petitioners respectfully pray that this application be granted and that proper orders be entered by the Commission substantially in accordance with the

provisions of this application and that such further relief as may be fair and equitable be granted to your petitioners.

Carter H. Harrison, Jr., Stephen V. R. Crosby, Charles F. Grey, and George E. Pike, as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock

By Loy N. McIntosh, Their Attorney,
Suite 3610
135 South La Salle Street
Chicago, Illinois

Dated this 25th day of August, A. D. 1943.

State of Illinois
County of Cook } ss:

Loy N. McIntosh, being first duly sworn, deposes and says: I am one of the attorneys for the applicants herein. I have read the foregoing application and know the contents thereof and the same is true to my own knowledge except as to those matters, if any, therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

.....

Subscribed and Sworn to before me this ..... day of August, A. D., 1943.

.....,
Notary Public.

APPENDIX (D)

IN THE

DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division

In the Proceedings for the Reorganization of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Debtor.	No. 23,209

Before The
INTERSTATE COMMERCE COMMISSION

In the Matter of THE REORGANIZATION OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Debtor.	Finance Docket No. 53,209

Petition of Protective Committee for the Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock for Reconsideration of the Order Dated October 4, 1943 Denying the Petition of Said Committee That the Proceedings Before the Commission on the Reference Back By the Court Be "De Novo" and for an Opportunity to Introduce Evidence.

The petitioners, Carter H. Harrison, Jr., Stephen V. R. Crosby, Charles F. Grey, and George E. Pike, as the Pro-

tective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred stock on behalf of the holders of said stock represented by them, respectfully petition the Commission:

1. To reconsider its order dated October 4, 1943, denying the petition of said Committee filed with the Commission on September 1, 1943, asking for the entry of an order, that all proceedings before the Commission pursuant to the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, among other things, referring back to the Commission the proceedings for further action, in accordance with the application provisions of Section 77 of the Bankruptcy Act, be de novo under the provisions of sub-section (d) of Section 77 of the Bankruptcy Act, and that the Commission by its order specify the date on or before which the Debtor shall file a Plan of Reorganization and within which time other proper parties in interest may file their respective plans of reorganization; and

2. To allow the said Committee, if the record does not otherwise contain facts and information relating thereto, to introduce evidence showing the financial and industrial history of the Debtor since the close of the record upon which the Plan of Reorganization now rejected by the Court was approved.

This petition is being filed pursuant to the provisions of 49 USCA, Section 17(6), and pursuant to Rule 101 of the Commission.

As cause for the filing of this petition subsequent to thirty days after the entry of the aforesaid order but within sixty days after the service of said order, petitioners show that the interests represented by them are vested in a

very large number of persons whose residences or places of business are widely scattered throughout the United States of America, that the members of the Committee live in distant parts of the United States from each other and that, therefore, it is a difficult matter to resolve into a decision what action should be taken by the Committee in the furtherance of the interests of the said preferred stockholders. The Committee upon receipt of the order denying their said petition that the proceedings be de novo, immediately started consultations with the various interests involved to determine the action it should take, and upon such determination took steps to prepare and file this petition.

It has become more apparent that the import of the application of this Committee that all proceedings before it, pursuant to the order of the court referring back to the Commission the proceedings for further action be de novo under the provisions of sub-section (d) of Section 77 of the Bankruptcy Act, was not fully understood by those parties in interest who opposed the petition for such an order.

It was not the intent nor is it now the desire of this Committee that all or any part of the record before the Commission to the date of its approval of the Plan of Reorganization as amended, or any part of the record to any other date, be destroyed nor that the Commission be required to ignore all facts which to said dates were a matter of record before it, nor that the Commission require the creation of a new record beginning with the inception date of the bankruptcy proceedings and brought down to date, which obviously would require a duplication of evidence, record, and hearing time.

What the Committee, by its petition of September 1,

1943, sought, and what it now seeks is that the record before the Commission relating to the Debtor be supplemented beginning with the date on which the record was closed when the final Plan of Reorganization was approved (which was subsequently disapproved by the court) and brought down to date, showing complete information as to the Debtor's properties, cash position, debts, and actual earnings. This procedure clearly is contemplated by subsections (d) and (e) of Section 77 of the Bankruptcy Act. Thereunder, this Committee asserts that, (a) the Commission must set a new effective date of a new Plan of Reorganization; (b) the Debtor must file a new Plan of Reorganization; (c) any other proper parties in interest are entitled to file their respective plans of reorganization within a reasonable time to be fixed by the Commission; and, (d) the Commission is required to receive additional evidence relating to the current position of the trust estate of the Debtor.

By requiring that the proceedings now before the Commission be de novo as above construed, the Commission then can comprehensively, based upon facts and not upon conjecture, determine, in obedience to legal standards, what the earnings of the Debtor have been in the interim since the closing of the record before the Commission, and be thereby the better enabled in its prediction of future events to project what the probable earnings of the Debtor will be in future normal years, and thereupon to arrive at what is currently to be determined as a proper capitalization of the Debtor's properties when a new Plan of Reorganization is approved by the Commission.

To ignore the marked improvement of the Debtor's properties occurring in the years 1941, 1942, and 1943, in now approving the heretofore approved Plan of Reorganization,

modified only as suggested by the court, would be arbitrary. It would not be in obedience to legal standards. It is apparent when the now materially improved position of the Debtor is given due consideration, [and which facts this Committee is prepared to introduce by way of evidence if such facts are not now before the Commission or are not filed with the Commission by the Trustees of the Debtor,] that the findings of the Commission, in previously approving the plan which was rejected by the court, purported to be based upon evidence as to a normal year's earnings (which the Commission used as a basis for total permissible capitalization) were so far from the actual results now fully demonstrated by the Debtor for the years 1941, 1942, and a portion of 1943, that the Commission could not then or now be considered to have "acted fairly" or "in obedience to legal standards" in again approving the court rejected plan, or now in approving said plan modified as suggested by the court.

The petitioners respectfully show that the Commission approved the court rejected plan partially on its prediction of "future events", namely, that with gross revenues of $100,000,000 in a normal year, earnings available in a normal year for interest and dividends of approximately $11,000 000 were reasonably well supported by the evidence of record (242 I. C. C. 437). The Commission then concluded that there was "no reasonable probability" of greater earning power, yet the fact remains that in the year 1941, when the gross revenues of the Debtor were $96,962,498 (approximately $3,000,000 less than what the Commission called a normal year) the Debtor netted a balance for interest of $18 149,928, or 66% more than the Commission's appraisal. Thus the then informed projecture of the Commission that there was "no reasonable probability of such earning power" has been reversed by

the inescapable and ineradicable fact that with gross revenues of $3,000,000 less than the estimated "normal" such "earning power" actually existed. The Commission has before it the Debtor's trustees' reports for the years 1941, 1942, and a portion of the year 1943. The trustees' report for the year 1942 shows the following facts as to the revenues of the Debtor:

Gross revenues	$137,067,138
Net railway operating income	36,557,111
Percent of gross	26.67

and for 1943:

Gross revenues	$119,500,544
Net railway operating income	29,844,911
Percent of gross	25.08

It will thus be noted that in 1942 on gross revenues of $137,000,000, the Debtor carried some $36,000,000 down to net after taxes, and that in 1943, by September 1st, the Debtor carried some $29,000,000 down to net after taxes. In 1929 on gross revenues of $147,700,000, the amount available for interest was $25,800,000. It is apparent that in 1942 with $10,000,000 less revenue than in 1929, the Debtor's system produced $10,000,000 more net, and in comparison with the first eight months of 1943, the Debtor with less revenue than in 1929 has produced some $4,000,000 more net. This notwithstanding that the level of freight rates was higher in 1929 than in 1942 and 1943. The average revenue per ton mile of the Debtor in 1942 was 8.9; in 1929 it was 11.5. In 1942 the Debtor's net earnings were three times the unpaid interest on its old funded debt, and projecting the net railway operating income of the Debtor for the last four months of 1943 to be $12,000,000, the Debtor's estimated total net earnings of $42,000,000.00 will be more than 3.5 times the unpaid interest on its old funded debt. The net earnings in 1942

were enough to pay all of the interest on that funded debt, full dividends on the old preferred stock, leaving about $25.00 a share for the old common stock. This record by a projection of the net earnings of the Debtor for 1943 will be more than enough to pay all the interest on the old funded debt, full dividends on the old preferred stock, leaving about $26.00 a share for the common stock. This gross undoubtedly was due to war traffic, but the ability to translate such a large portion of it into net was due to the increased efficiency of operation which the Commission heretofore did not adequately consider.

By the requirement of the submission of a new Plan of Reorganization and by requiring the record to be brought down to date, the Commission can correct the injustice done to the stockholders of the Debtor when it approved the court rejected plan. By so doing, the Commission, in determining a new evaluation of "earning power" (based upon such record brought down to date and upon a prediction of future events) can redetermine a now new proper capitalization of the Debtor's property. Thus it will be acting fairly and in obedience to legal standards which it can not be considered to do if (a) it ignores the now materially improved position of the Debtor and (b) considers itself bound by the restriction of the court order of reference back.

Brief statement of evidence to be adduced.

This Committee proposes if the report of the trustees of the Debtor now on file with the Commission do not establish the following facts to adduce evidence in substantiation thereof:

First: The Debtor's financial condition as to cash on hand January 1, 1942 was some $16,000 000, whereas the

trustees' estimate of cash to be on hand as of January 1, 1944 is some $79,000,000.

Second: The net favorable balance as of June 30, 1943, compared with January 1, 1942, as is shown by Exhibit 642 "Other Unadjusted Debts," and "Other Unadjusted Credits," is $6,825,000.

Third: The unpaid equipment obligations included in the plan as of January 1, 1942 (the court rejected plan) were approximately $24,000,000 whereas as of January 1, 1944, the unpaid equipment obligations will be $11,900,000, or an improvement of some $13,000,000 in the amount of equipment obligations outstanding as of January 1, 1942.

Fourth: The $447,000 of equipment purchase contracts included in the plan as of January 1, 1942, have been paid off in full.

Fifth: The reorganization expenses provided for in said plan as of January 1, 1942 in the amount of $1,000,000 have now been paid in full. (This item of $1,000,000 was included in the item of $11,000,000 which said plan contemplated would be funded in new first mortgage bonds.

Sixth: A summary of the improvements and the assets of the Debtor in the years 1941, 1942, and 1943, to date is:

(a) Improvement in cash position	$66,000,000
Improvement in unadjusted accounts (Composed largely of freight charges and freight and passenger charges on government business)	6,825,000
Improvement in equipment debt	13,000,000
Improvement in matters for which it was originally contemplated that bonds in the amount of $11,000,000 would be issued	11,000,000
Total improved cash position as a minimum to date, approximately	$96,825,000

(b) That the improvement in net earnings of the Debtor was due to the increased efficiency of operation resulting from the trustees improvement program and that such increased efficiency is further indicated by a comparison of the Debtor's performance for 1942 and the first 7 months of 1942 with that of the other railroads operating in the Debtor's territory. These figures are:

	1942			1943 Jan. 1 to July 31, incl.		
	Gross Revenues	Net Railway Operating Income	% of Gross	Gross Revenues	Net Railway Operating Income	% of Gross
CRI&P	$137,067,138	$36,557,111	26.67	$103,245,008	$25,996,272	25.18
Milwaukee	179,867,280	34,504,654	19.18	124,462,297	32,292,184	25.95
Burlington	165,289,325	37,173,683	22.49	118,933,318	26,203,651	22.03
North Western	138,395,019	24,939,999	18.02	91,556,989	18,768,899	20.50
Illinois Central (system)	213,026,422	41,007,920	19.25	143,890,415	23,686,369	16.46
Santa Fe	361,148,930	83,547,609	23.13	264,442,949	35,831,995	13.55
Union Pacific	353,064,543	61,024,726	17.28	263,011,050	26,457,966	10.06
Missouri Pacific	178,424,500	49,309,302	27.63	127,192,354	24,976,268	19.64
Frisco	85,577,649	25,874,296	30.23	60,108,273	13,102,092	21.80

(c) That the territory served by the Debtor from Amarillo, Texas, to Memphis, Tennessee, and to Chicago, Illinois, is no longer primarily an agricultural district but has expanded substantially as an industrial district. This change will permanently increase the freight tonnage haul by the Debtor in future years.

Against this must be set off the increase in accumulated and unpaid interest over the period involved amounting to approximately $25,000,000, leaving a now minimum net improvement of some $71,000,000 in the assets of the trust estate.

The granting of this petition will provide the means by which the record of the Debtor can be brought down to

date. While it is not proposed that the Commission should capitalize the $71,000,000 improved cash position, it is, however, absolutely necessary that the junior interests be given credit for such $71,000,000 by the application of the entire amount thereof to the senior debts of the Debtor in the order of their priority. This $71,000,000 net improved cash position to-date of the Debtor manifests clearly that the Debtor has an earning power very substantially greater than the estimated normal earning power of the Debtor which the Commission determined to be $11,000,000. If the Commission grants this petition and receives in evidence the facts as are hereinbefore set forth, the Commission will have before it a new basis in addition to the other matters set forth herein for a fair prediction of future earnings of the Debtor. All these known facts not now of record clearly demonstrate that the earnings of the Debtor will be sufficient to pay prior claims of principal and interest and leave some surplus for service of the stock. It clearly is the intent of the Bankruptcy Act to preserve the property of the Debtor. This statute was passed for the relief of debtors. It was not intended by the statute that the debtor should be extinguished. Who is the debtor if it is not in reality (disregarding legal fiction) the debtor's stockholders? The Commission in granting this petition: in requiring that the proceedings before it be *de novo* as herein outlined; in requiring that the record to be brought down to date; in properly taking into consideration the record as thus expanded which would include the improved condition of the Debtor's properties; and in giving due weight to the reasonably probable earning power of the Debtor, can then be said to have acted fairly and in obedience to legal standards, otherwise not.

Wherefore, petitions respectfully pray (a) that the

Commission reconsider its order of October 4, 1943, denying the petition of the petitioners that proceedings now before the Commission be *de novo,* (b) that it set aside said order and direct that the proceedings pending before it subsequent to the order of the District Court in referring the proceedings back to it, be *de novo* in accordance with the principles set forth in this petition, and (c) that the Commission specify the time when the additional evidence as is hereinbefore set forth shall be adduced before it.

Carter H. Harrison, Jr., Stephen V. R. Crosby, Charles F. Grey, and George E. Pike, as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock

By Loy N. McIntosh, Their Attorney,
Suite 3610
135 South La Salle Street
Chicago, Illinois.

Dated this 19th day of November, A. D. 1943.

County of Cook }
State of Illinois } ss.

I certify that I have this day served the foregoing petition of the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% preferred stock upon all parties of record in this proceeding by mailing copies thereof properly addressed to each party of record herein.

Dated at Chicago, Illinois, this 19th day of November, A. D. 1943.

.....,

Subscribed and sworn to before me this 19th day of November, A. D. 1943.

.....,

APPENDIX (E)

Excerpt From Supplemental Report of Interstate Commerce Commission Submitted October 11, 1943 Decided January 3, 1944 Finance Docket No. 10028

"Supplemental Report of the Commission

By the Commission:

"By our report and order of October 31, 1940, supplemental report and order of July 31, 1941, and report on further consideration and amendatory order of October 2, 1941, in the above proceeding, we approved a plan of reorganization of the Chicago, Rock Island & Pacific Railway Company, hereinafter called the debtor, and certified the same to the United States District Court for the Northern District of Illinois, Eastern Division, all pursuant to the provisions of section 77 of the Bankruptcy Act, 11 U. S. C. 205. 242 I. C. C. 298, 247 I. C. C. 533, and 249 I. C. C. 297. Hearings were held on the objections to the plan before the court during the week of October 13, 1941. In order to supply additional information for the court in considering the plan, we issued our supplemental report of April 6, 1942, 252 I. C. C. 483. The judge rendered an opinion dated June 3, 1943, disapproving all of the objections to the plan with two exceptions and suggested that on the motion of any party in interest, the court would enter an order referring the proceeding back to us for further action. 50 Fed. Supp. 835. Upon the motion of the group of institutions holding first and refunding mortgage bonds of the debtor, here-

inafter called the first and refunding group, the court entered an order on June 25, 1943, referring the proceeding back to us for consideration of seven matters relating to the plan. The abbreviated titles used in our previous reports generally will be used herein.

* * *

"In accordance with the provisions of subsection (e) of section 77 a further hearing for the purpose of receiving evidence in respect of the matters specified in the court's opinion and order was held before us on September 1, 1943, and briefs have been filed.

* * *

"The protective committee for the debtor's preferred stock on August 30, 1943, filed a petition with us requesting the entry of an order that all proceedings now before us pursuant to the order of the court entered June 25, 1943, referring the proceedings back to us for further action be *de novo*, and that a time be fixed by us for the filing of plans of reorganization by the debtor and others, and that all such plans of reorganization should contain provision authorizing the debtor's trustees to pay certain loans and use available cash for the purpose of discharging the claims of the debtor's creditors at par or a discount from par principal. By our order of October 4, 1943, we denied this petition."

APPENDIX (F)

IN THE

DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

In the Matter of
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.
No. 53209.

Objections of the Protective Committee for the Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock to the Plan of Reorganization As Modified and Approved By the Interstate Commerce Commission on May 1, 1944.

The Protective Committee for The Chicago, Rock Island and Pacific Railway Company, 7% and 6% Preferred Stock, without waiving any of its previous objections to the Plan, hereby submits the following detailed and specific objections to the Plan as modified by the Interstate Commerce Commission's Report of May 1, 1944.

Objections

1. The Plan as modified is not based on new findings subsequent to the re-reference to the Interstate Commerce Commission by the Court.

(a) On the re-reference the Commission denied the motion of the Committee that the proceedings on the re-reference be under Subdivision D of Section 77.

(b) On the re-reference the Commission refused to require the Debtor to submit a new Plan of Reorganization and to permit parties in interest to file their respective Plans of Reorganization within a time to be fixed by the Commission.

(c) On the re-reference the Commission refused to permit the record before it to be brought down to date to show the financial condition of the Debtor.

2. The Plan as modified is unfair and inequitable because it uses as the "normal" earning period the years 1936 and 1937. The Commission selected the years 1936 and 1937 as typical normal earning years notwithstanding the fact that the earnings for the two said years (a) averaged 66% of the average earnings of the Debtor for the five year period from 1931 to 1935, inclusive, (b) averaged 24% of the average earnings of the Debtor for the five year period from 1927 to 1931, inclusive, and (c) averaged 68% of the average earnings of the Debtor for the entire depression decade of 1931 to 1940, inclusive. Included in this ten year period is the year 1935 which is the only year in said period in which there was an operating deficit. If said year were eliminated from the ten year period and nine years of the depression average were taken, the Commission's selected normal figure is approximately 61% of the average for said nine years' net income. The selection of the years 1936 and 1937 as a normal period was arbitrary. Such selection is not both fair and reasonable.

3. The Plan as modified is unfair and inequitable in that it does not follow the rule of the Supreme Court of the United States in *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, holding that interest on a claim has the same rank as the principal of that claim in reorganization.

4. The Plan as modified fails to provide that new se-

c urities withheld as a result of the reduction of claims as of January 1, 1944, below the amount stated in the Appendix A to the Supplementary Report of the Commission of January 3, 1944, be (under Title 11, Section 205(b), U. S. C. A.) directed to be issued as new securities for the purpose of preserving the interest of creditors not otherwise satisfied and of the present stockholders of the Debtor to the extent possible, first, for the preferred stockholders, and, second, for the common stockholders, rather than directing as the modified Plan does, that new securities so withheld shall be treasury securities.

5. The Plan as modified fails to provide under the provisions of Title 11, Section 205(b)(3), U.S.C.A. for the issuance to stockholders of options or warrants to receive or to subscribe for securities of the reorganized company.

6. The Plan as modified fails to give effect to the fact that the Debtor is solvent and that one of the purposes of Section 77 of the Bankruptcy Act is to preserve the property of the Debtor for its stockholders (See Title 11, Section 205(b)(3), U.S.C.A.). Reference is made to the Report of the Trustees of the Debtor, filed with this Court April 25, 1944, and to Exhibit B attached to said Report. As of December 31, 1943, the grand total of assets of the Debtor was $629,212,810.51 with the grand total of liabilities of the same amount. Included in the grand total of liabilities is total stock outstanding of $128,892,511.50, as well as "total surplus (deficit)" of $63,086,292.06. By deducting this last net surplus deficit figure from the total stock of $128,892,511.50, the net capital position of the Debtor is $65,816,219.44. Therefore, the Debtor is solvent in accordance with the statement of the Trustees as of the effective date of the modified Plan in the amount of $65,816,219.44 in excess of its total liabilities. Therefore, the modified Plan should have allocated said $65,816,219.44 to the present stockholders.

The modified Plan proposes a total capitalization of $365,117,327. The effect of that proposal is to deprive the present stockholders of their present equity of $65,816,-219.44 and to give it as a bonus to the present creditors of the Debtor.

Claim for Equitable Treatment.

The Trustees of the Debtor have, as indicated by their Report filed with this Court on April 25, 1944, operated the properties of the Debtor in a most efficient manner under the direction of the Court. This Committee in recognition of the very valuable services of the Trustees of the Debtor and the management personnel, all under the direction of the Court, desires to express its appreciation of the achievements attained. It is significant as shown by Exhibit B attached to the Trustees' said Report that in the year 1943 the surplus deficit of the Debtor was reduced by the sum of $9,874,870.77. The said Report of the Trustees shows that the total railway operating revenues of the Debtor of $176,644,686 for the year 1943 and the net income of $37,037,708 (after the deduction of $21,100,000 for Federal income taxes, plus rental and interest charges which are being paid by the Trustees) are the largest in the history of the Debtor; that as of the close of business on December 31, 1943, cash on hand (or its equivalent in United States Government securities at par) amounted to $82,-104,525 as compared with $38,919,306 on January 1, 1943, or an increase in cash or its equivalent at the close of the year 1943 of $43,185,219; that the large increases in revenue in the year 1943 over 1942 are due to the continuation of an unprecedented volume of business, both freight and passenger traffic, which started in the last half of 1942 and continued in increasing proportions through the year 1943, excepting a slight decrease or leveling off in the fall due to a

tapering off of Government construction projects, but that (page 7) during the depression years of abnormally low revenues, the expenditures for maintenance of way and structures and maintenance of equipment were reduced to the minimum consistent with safety of operation. As a result thereof, considerable deferred maintenance accumulated during the years 1932 to 1936. However, during the ensuing years to 1942, a general improvement program of planned expenditures progressed with respect to both roadway structures and equipment. (Page 8) As a result of the many improvements of a permanent nature which have been made to the property, substantial economies have been effected in expenditures for both roadway and equipment maintenance. Therefore, despite the large increase in wages and the exceptionally heavy volume of traffic, as may be noted from the tabulations contained in the Report, the ratio of each of these classes of expenditures to total railway operating revenue for the year 1943 is lower than any of the other years. (Page 9) As may be noted from the tabulation on page 9 of the Trustees' Report there has been a continual steady improvement each year, since 1935, in the ratio of transportation expense and total operating expense to gross revenues and, notwithstanding the all time peak wages and the higher cost of fuel, materials and supplies in the year 1943, the ratios of 28.62 and 59.43, respectively, for that year establish the all time low ratios in the annals of the company. The pronounced reductions which have been made in these ratios are due not alone to the larger revenues, but are also the result of the savings which have been effected in transportation and operating costs by reason of the improvements to the property, the extensive use of Diesel powered locomotives and the operation of light-weight streamlined passenger trains. (Page 10) As may be noted from the

comparison set out on page 10 of the Trustees' Report, the increased volume of business has been handled at relatively low costs commencing particularly in 1939, *since when the full impact of the improvements have resulted in substantial operating economies.* (Page 24) Net operating income from operation of the fleet of Rocket passenger trains aggregated $9,681,467 for the year 1943 and $20,621,678 from the commencement of the operation of the first train in the fall of 1937, to December 31, 1943. The income from these trains, as stated, is after charging depreciation, taxes and insurance on the equipment and interest on the investment therein; it is equal to a return on the investment in the equipment (locomotives and cars) of 164% for the year 1943 and 349% for the cumulative period of operation to December 31, 1943. (Page 25) During the year 1943 twenty major industries were located on the Rock Island Lines in the State of Illinois, Iowa, Kansas, Minnesota, Oklahoma, Missouri and Arkansas representing an investment of $1,900,000 by the owners of the plants. Among these were six soybean processing mills, two elevators, four warehouses and six clay or chemical plants. Thirty-one new industrial tracks were built to serve industries or expansion of industries. The increase in Rock Island revenue from these industries is estimated at $962,000 per annum.

A Debtor with a net capital position of $65,816,219.44 is not insolvent. It is unfair and inequitable to deprive the present stockholders of the benefits of the improvements which have been accomplished by the Debtor during the period of the receivership. It is proposed that the Court should withhold its approval of any Plan of Reorganization for the time being and that it should await the outcome of House of Representatives Bill 4873, known as the "Hobbs Bill" which, if enacted into law, will amend Section 77 of the Bankruptcy Act substantially in

the following manner: (1) to insure that the Courts shall make an independent judicial review of each railroad reorganization plan, and (2) to provide that the existing total capitalization shall not be reduced below the lower of either the investment in the property or the physical valuation of it. Should the Hobbs Bill (which was reported by the Judiciary Committee June 12, 1944) become the law before these proceedings are disposed of, this Court would under its provisions be required to see that the Plan of Reorganization complied with the provisions of the Hobbs Bill. It is, therefore, equitable that the Debtor corporation be continued under the administration of the Court through its Trustees until such time as the debts of the corporation existing on the date on which the Debtor's petition to the Court was approved as properly filed, plus the obligations of the Trustees, have been paid in full and thereupon direct that the properties be returned to the Debtor. From the present earning capacity of the railroad, its present improved property condition and an estimate based upon an informed judgment which embraces all facts relative to future earning capacity and hence to present worth, the time will be relatively short within which such program can be accomplished. (*Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217) This procedure also will be in harmony with *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 at page 672:

> "* * * Congress, by Section 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined, after consideration that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is 'unable to meet its debts as they mature.' The last phrase, since it is used as an alternative for the word 'insolvent,' obviously means something less than a condition of 'bankruptcy' or 'in-

solvency' as those words are employed in the law. See Bankruptcy Act Section 1 (15) which defines an 'insolvent' as one whose assets, at a fair valuation are not sufficient to pay his debts. *It may be construed to include a debtor who, although unable to pay promptly, may be able to pay if time to do so be sufficiently extended.*"

The Debtor, if not able now to pay promptly all of its debts, will, as demonstrated by the Trustees' Report of April 25, 1944, be able to pay all of its debts if time to do so be sufficiently extended.

The Committee prays that the Court withhold approval of the modified Plan.

Respectfully submitted

CARTER H. HARRISON, JR., STEPHEN V. R. CROSBY, CHARLES F. GREY and GEORGE E. PIKE, as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

By LOY N. MCINTOSH, *Their Attorney,*
Suit 3610,
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Chicago 3, Illinois.

GANN, SECORD, STEAD AND MCINTOSH,
Of Counsel.
Dated: June 16, 1944.

Appendix G

79TH CONGRESS *2d Session* — HOUSE OF REPRESENTATIVES — REPORT No. 2691

REORGANIZATION OF RAILROADS

JULY 27, 1946.—Ordered to be printed

Mr. HOBBS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1253]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1253) to enable debtor railroad corporations expeditiously to effectuate reorganizations of their financial structures; to alter or modify their financial obligations; and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment, as follows:

In lieu of the matter inserted by the amendment of the House insert the following: *That (1) it shall be lawful (any express provision contained in any mortgage, indenture, deed of trust, or other instrument to the contrary notwithstanding), with the approval and authorization of the Interstate Commerce Commission (hereinafter referred to as the Commission), as provided in paragraph (2) hereof, for a*

carried as defined in section 20a (1) of Part 1 of the Interstate Commerce Act to alter or modify (a) any provision of any class or classes of its bonds, notes, debentures, or other indebtedness, (whether secured, unsecured, matured, or unmatured) issued under any mortgage, indenture, deed of trust, or other instrument, or otherwise created, such bonds, notes, debentures, or other evidences of indebtedness being hereinafter in this section sometimes called "obligations"; (b) any provision of any mortgage, indenture, deed of trust, or other instrument pursuant to which any class of its obligations shall have been issued or by which any class of its obligations is secured: Provided, That the provisions of this section shall not apply to any equipment-trust certificates in respect of which a carrier is obligated, or to any evidences of indebtedness of a carrier the payment of which is secured in any manner solely by equipment, or to any instrument, whether an agreement, lease, conditional-sale agreement, or otherwise, pursuant to which such equipment-trust certificates or such evidences of indebtedness shall have been issued or by which they are secured.

(2) Whenever an alteration or modification is proposed under paragraph (1) hereof, the carrier seeking authority therefor shall, pursuant to such rules and regulations as the Commission shall prescribe, present an application to the Commission. The Commission shall set such application for public hearing and the carrier shall give such notice of such hearing in such manner, by advertisement or otherwise, as the Commission may find practicable and may direct, to holders of such of its classes of securities and to such other persons in interest as the Commission shall determine to be appropriate and shall direct. If the Commission, after hearing, in addition to making (in any case where such alteration or modification involves an issuance of securities) the findings required by paragraph (2) of

said section 20a, shall find that, subject to such terms and conditions (not constituting alterations or modifications of obligations or securities) and with such amendments (altering or modifying the obligations affected by the alteration or modification proposed by the carrier) as the Commission shall determine to be just and reasonable, the proposed alteration or modification—

(a) is within the scope of paragraph (1);

(b) will be in the public interest;

(c) will be in the best interests of the carrier and of the holders of each class of its obligations affected by such modification or alteration; and

(d) will not be adverse to the interests of the holders of any other class of the carrier's securities or to the interests of any creditor of the carrier not affected by such modification or alteration,

then (unless the applicant carrier shall withdraw its application) the Commission shall cause the carrier, in such manner as it shall direct, to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any) to the holders of each class of its obligations affected thereby, for acceptance or rejection. If the Commission shall find that as a result of such submission the proposed alteration or modification has been assented to by the holders—

(i) of at least 66 2/3 per centum of the aggregate principal amount outstanding of each class of obligations affected thereby; or

(ii) of less than 66 2/3 per centum but not less than 51 per centum of any particular class or classes of securities affected, and the Commission, after hearing, finds that such reduction in percentage will be just and reasonable and in the public interest; or

(iii) in any case where 66 2/3 per centum thereof is

held by fewer than twenty-five holders, of such larger percentage, if any, as the Commission, after hearing, finds will be just and reasonable and in the public interest;

the Commission shall enter an order approving and authorizing the proposed alteration or modification upon the terms and conditions and with the amendments, if any, so determined to be just and reasonable. Such order shall make provision as to the time when such alteration or modification shall become and be binding, which may be upon publication of a declaration to that effect by the carrier, or otherwise, as the Commission may determine. Any alteration or modification which shall become and be binding pursuant to the approval and authority of the Commission hereunder shall be binding upon each holder of any obligation of the carrier of each class affected by such alteration or modification, and upon any trustee or other party to any instrument under which any such class of obligations shall have been issued or by which it is secured, and when any alteration or modification shall become and be binding the rights of each such holder and of any such trustee or other party shall be correspondingly altered or modified.

(3) For the purposes of this section a class of obligations shall be deemed to be affected by any modification or alteration proposed only (a) if a modification or alteration is proposed as to any provision of such class of obligations, or (b) if any modification or alteration is proposed as to any provision of any instrument pursuant to which such class of obligations shall have been issued or shall be secured: Provided, That in any case where more than one class of obligations shall have been issued and be outstanding or shall be secured pursuant to any instrument, any alteration or modification proposed as to any provision

of such instrument, which does not relate to all of the classes of obligations issued thereunder, shall be deemed to affect only the class or classes of obligations to which such alteration or modification is related. For the purpose of the finding of the Commission referred to in paragraph (2) of this section as to whether the required percentage of the aggregate principal amount outstanding of each class of obligations affected by any proposed alteration or modification has assented to the making of such alteration or modification, any obligation which secures any evidence or evidences of indebtedness of the carrier or of any company controlling or controlled by the carrier shall be deemed to be outstanding unless the Commission in its discretion determines that the proposed alteration or modification does not materially affect the interests of the holder or holders of the evidence or evidences of indebtedness secured by such obligation. Whenever any such pledged obligation is, for said purposes, to be deemed outstanding, assent in respect of such obligations, as to any proposed alteration or modification, may be given only (any express or implied provision in any mortgage, indenture, deed of trust, note, or other instrument to the contrary notwithstanding) as follows: (a) where such obligation is pledged as security under a mortgage, indenture, deed of trust, or other instrument, pursuant to which any evidences of indebtedness are issued and outstanding, by the holders of a majority in principal amount of such evidence of indebtedness, or (b) where such obligation secures an evidence or evidences of indebtedness not issued pursuant to such a mortgage, indenture, deed of trust, or other instrument, by the holder or holders of such evidence or evidences of indebtedness; and in any such case the Commission, in addition to the submission referred to in paragraph (2) of this section, shall cause the carrier in such manner as it shall direct to submit the proposed alteration or modification (with

such terms, conditions, and amendments, if any, as the Commission shall have determined to be just and reasonable) for acceptance or rejection, to the holders of the evidences of indebtedness issued and outstanding pursuant to such mortgage, indenture, deed of trust, or other instrument, or to the holder or holders of such evidence or evidences of indebtedness not so issued, and such proposed alteration or modification need not be submitted to the trustee of any such mortgage, indenture, deed of trust, or other instrument, but assent in respect of any such obligation shall be determined as hereinbefore in this section provided. For the purpose of any such assent the evidences of indebtedness issued and outstanding under any such mortgage, indenture, deed of trust, or other instrument shall be determined by the Commission.

(4) (*a*) *Any authorization and approval hereunder of any alteration or modification of a provision of any class of obligations of a carrier or of a provision of any instrument pursuant to which a class of obligations has been issued, or by which it is secured shall be deemed to constitute authorization and approval of a corresponding alteration or modification of the obligation of any other carrier which has assumed liability in respect of such class of obligations as guarantor, endorser, surety, or otherwise: Provided, That such other carrier consents in writing to such alteration or modification of such class of obligations in respect of which it has assumed liability or of the instrument pursuant to which such class of obligations has been issued or by which it is secured, and, such consent having been given any such corresponding alteration or modification shall become effective, without other action, when the alteration or modification of such class of obligations or of such instrument shall become and be binding.*

(b) Any person who is liable or obligated contingently or otherwise on any class or classes of obligations issued by a carrier shall, with respect to such class or classes of obligations, for the purposes of this section, be deemed a carrier.

(5) The authority conferred by this section shall be exclusive and plenary and any carrier, in respect of any alteration or modification authorized and approved by the Commission hereunder, shall have full power to make any such alteration or modification and to take any actions incidental or appropriate thereto, and may make any such alteration or modification and take any such actions, and any such alteration or modification may be made without securing the approval of the Commission under any other section of the Interstate Commerce Act or other paragraph of this section and without securing approval of any State authority, and any carrier and its officers and employees and any other persons, participating in the making of an alteration or modification approved and authorized under the provisions of this section or the taking of any such actions, shall be, and they hereby are, relieved from the operation of all restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to make and carry into effect the alteration or modification so approved and authorized, in accordance with the conditions and with the amendments, if any, imposed by the Commission. Any power granted by this section to any carrier shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. The provisions of this section shall not affect in any way the negotiability of any obligation of any carrier or of the obligation of any carrier which has assumed liability in respect thereto.

(6) The Commission shall require periodical or special reports from each carrier which shall hereafter secure from

the Commission approval and authorization of any alteration or modification under this section, which shall show, in such detail as the Commission may require, the action taken by the carrier in the making of uch alteration or modification.

(7) The provisions of this section are permissive and not mandatory and shall not require any carrier to obtain authorization and approval of the Commission hereunder for the making of any alteration or modification of any provision of any of its obligations or of any class thereof or of any provision of any mortgage, indenture, deed of trust, or other instrument, which it may be able lawfully to make in any other manner, whether by reason of provisions for the making of such alteration or modification in any such mortgage, indenture, deed of trust, or other instrument, or otherwise: Provided, That the provisions of paragraph (2) of said section 20a, if applicable to such alteration or modification made otherwise than pursuant to the provisions of this section, shall continue to be so applicable.

(8) The provisions of paragraph (6) of said section 20a, except the provisions thereof in respect of hearings, shall apply to applications made under this section. In connection with any order entered by the Commission pursuant to paragraph (2) hereof, the Commission may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any such order, subject always to the requirements of said paragraph (2).

(9) The provisions of subdivision (a) of section 14 of the Securities Exchange Act of 1934 shall not apply to any solicitation in connection with a proposed alteration or modification pursuant to this section.

(10) The Commission shall have the power to make such rules and regulations appropriate to its administration of this section as it shall deem necessary or desirable.

SEC. 2. *(1) All proceedings under section 77 of the Bankruptcy Act, whether before the Interstate Commerce Commission or United States courts, relating to the preparation or effectuation of plans of reorganization of each carrier by railroad as defined in said section 20a (1) whose properties on the effective date of this Act or at any time thereafter are in the custody of the United States courts, shall be forthwith suspended and discontinued as of the effective date of this Act—*

(A) If the gross railway operating revenues of such carrier for any of the calendar years 1942 to 1944, inclusive, were in excess of $50,000,000; or of its gross railway operating revenues were not in excess of such amount, such carrier is a debtor in any such proceeding, or is a party defendant in any proceeding ancillary thereto, with another such carrier whose revenues were so in excess; and

(B) If, for the period of seven calendar years from 1939 to 1945, inclusive, the total of the income reported to the Commission as income available for fixed charges, plus (a) the total of any amounts so reported as a deficit for fixed charges in any of said seven years to the extent of the total of any amounts reported for Federal income and excess-profits taxes in any of said years, and (b) amounts deducted in any year for amortization of emergency facilities under section 124 of the Internal Revenue Code in excess of 20 per centum of the cost of such facilities, of such carrier, or, on a joint or consolidated basis, of the carriers in the system of which such carrier is a part, or of such carrier and other carriers, directly or indirectly controlled by

it, through direct or indirect ownership of at least a majority of their stock, is at least equal to the reported total fixed charges (other than charges on intercompany obligations) of such carrier or carriers for such period.

(2) Carriers to which paragraph (1) of this section is applicable shall institute proceedings and file application under section 1 of this Act as expeditiously as practicable but in no event later than eighteen months after the effective date of this Act, or such longer period as the Commission, on application, may approve.

(3) The properties of any carrier specified in paragraph (1) of this section shall continue in the custody of the United States courts having custody of them; except that, the following portions of said section 77 shall not be applicable in any such case:

(a) The first two paragraphs of subsection (b).

(b) Subdivision (1) of subsection (c).

(c) The first five sentences, and the first seven words and the last twenty-two words of the sixth sentence, of subdivision (2) of subsection (c): Provided, That for the purposes of this section there shall be substituted for the said last twenty-two words of said sixth sentence, the words "custody and supervision of the judge".

(d) Subsections (d), (e), (f), and (k).

In addition to the foregoing exceptions and for the same purpose of applying to such carriers in the cases in which and during the period for which such custody is held under said section 77, and pending the consummation of proceedings under section 1 of this Act, the word "debtor" shall be substituted for the words "trustee or trustees" wherever such latter words occur in subdivisions (3), (5), (9), and (10) of subsection (c), and subsections (i) and (o), of said

section 77. The provisions of subsection (12) of subsection (c) of said section 77 shall be applicable to proceedings under this Act. The final determination heretofore or hereafter made in the United States courts with respect to the relative priorities as between the respective classes of security holders, the subordination of the interest of a creditor or security holder of the debtor to the interest of other creditors or security holders, or the validity, amount and priority of any claim shall continue in full force and effect. Nothing contained in this Act is intended or shall be construed to modify or rescind any such determination or to prevent or delay the prosecution to final determination of any such issue now pending, and not yet finally determined, in the United States courts. Nothing in this Act shall be deemed to limit, qualify or restrict the right of the debtor (which right of the debtor is hereby confirmed), with the approval of the court (a) to purchase in whole or in part any bond issues or other obligations of the debtor (including bonds or other obligations guaranteed or assumed by the debtor), at a discount or otherwise, provided that the court's approval of the debtor's purchase of any such obligations junior in lien to first lien mortgage bonds shall be granted only if the court finds, after hearing, that such purchase will be for the best interests of the estate of the carrier and will not deprive the holders of obligations senior in lien to the obligations proposed to be purchased, of adequate security and protection; (b) to hold or to retire and cancel any of its bonds or other obligations now held or hereafter acquired by the debtor; and (c) to make voluntary agreements or compromises with any creditor or creditors as to either principal or interest of his or their claims or the security therefor, provided that the court shall find, after hearing, that any such agreement or compromise will be in the best interests of the estate of the

carrier and will not unjustly or inequitably affect the claims or security of other creditors.

(4) The proceedings with respect to any such carrier specified in paragraph (1) of this section under section 77 of the Bankruptcy Act shall be dismissed upon consummation of proceedings affecting such carrier under section 1 of this Act, or upon payment of its matured, unpaid obligations, or the making of other arrangements with reference to such obligations satisfactory to the owners of the claims therefor; and such proceedings may be dismissed under the conditions and in the manner prescribed in subsection (g) of section 77 of the Bankruptcy Act: Provided, That in the event there has been a determination by the United States courts with respect to subordination of any claim, or the issue thereon has not been finally determined, the determination of that one issue, and only that issue, shall be continued and prosecuted to completion and shall be binding on the security holders of such company; but such continuance of the determination of that sole issue shall not delay the dismissal of the proceedings in any and every other respect.

(5) The appointment, term of office, powers, authority, compensation and fees of each trustee appointed by the court, and of each counsel of such trustee, shall be terminated on or before sixty days after the effective date of this Act: Provided, That if the board of directors of the carrier shall have been elected, pursuant to the provisions of paragraph (11) of this section, prior to the expiration of the afore-mentioned sixty-day period, the appointment, term of office, powers, authority, compensation and fees of such trustees and counsel shall be terminated forthwith.

(6) The provisions of this section shall not apply if at the time of filing the petition for reorganization under section 77 of the Bankruptcy Act as amended, more than

95 percent of the outstanding voting stock of the debtor railroad corporation shall have been owned or controlled, directly or indirectly, by voting trust or otherwise, by another railroad corporation not a debtor in the same proceeding under the said section 77 with the said debtor and/or by a corporation owning or controlling more than 95 percent of the outstanding voting stock of another railroad corporation; provided also, that this section shall not apply to a railroad corporation if (1) all of its stock is owned directly or indirectly by an operating railroad corporation, (2) both corporations are in the same proceeding under the said section 77, and (3) pursuant to the provisions in this paragraph, this section does not apply to the said operating railroad corporation which owns all of the stock of the said controlled railroad corporation. The term "corporation" as used in this paragraph shall be deemed to include its trustees appointed under the aforesaid section 77 of the Bankruptcy Act.

(7) If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder of any such carrier, the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interest or claims of the United States or of such agency or other corporation.

(8) The Commission shall designate one or more qualified members of its staff to serve as mediator or mediators in each of the proceedings under section 1 with respect to carriers specified under paragraph (1) of this section for the purpose of bringing the different classes of creditors and other security holders together, of being available to advise with them, of assisting in the effectuation of changes, compromises, arrangements, negotiations, and dealings

with the various classes of creditors and other security holders and with individuals, groups, and committees representing creditors or other security holders, of assisting in expediting all stages of the proceedings and the early termination and the consummation of all transactions hereunder, including all steps requisite for the effectuation thereof.

(9) In proceedings under section 1 with respect to a carrier specified in paragraph (1) of this section the Commission shall have the power, in its discretion, to submit to holders of obligations, any proposed alteration or modification affecting them which the Commission has caused the carrier to submit to such holders under the provisions of the fourth sentence of paragraph (2) of section 1 hereof; in the event that it is satisfied that such alteration or modification has been accepted by or on behalf of creditors of each class to which submission is required under section 1 holding more than two-thirds in amount of the total of the allowed claims of such class which have voted on said alteration or modification, the Commission shall enter an order approving and authorizing the proposed alteration or modification as provided in said paragraph (2) of section 1 hereof: Provided, That it shall enter such order in any case in which such alteration or modification has not been so accepted by the creditors of any class or classes if it finds, after hearing, that the alteration or modification makes adequate provision for fair and equitable treatment for the claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting them and all the relevant facts; and that the alteration or modification is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, and will conform to the requirements of the law of the land.

(10) If after having submitted a proposed alteration or modification to holders of affected obligations as provided in paragraph (9), the Commission shall not have entered an order approving and authorizing such proposed alteration or modification within a period of twelve months following the date of the filing of an application in accordance with paragraph (2) of this section, or such extended periods as the Commission on application therefor may approve, then the Commission, after hearings, shall formulate and submit to holders of affected obligations such alteration or modification as in its opinion meets the standards set forth in section 1 above; in applying such standards of section 1 for the purpose of any such alteration or modification under this paragraph, the Commission shall give full effect to all changes, facts, and developments since 1940, including, without limitation, for such period total railway operating revenues, operating expenses and other charges, net earnings, the full effect of amortization deductions on earnings of past and future years, improvements to the property, the effect of the released collateral through past or future payment of loans, cash and net current assets, retirements and purchases of debt, including retirements and purchases at a discount that have been made or that can reasonably be made, adjustment and reduction of interest rates on outstanding debt that may be made including the adjustment and reduction of interest rates for prior years. In the event the Commission is satisfied that such alteration or modification has been accepted by the percentages required for acceptance under the provisions of section 1 or of paragraph (9) of this section it shall enter an order approving and authorizing such alteration or modification, unless it finds that, prior to the entry of such order, the alteration or modification submitted under paragraph (9) has been ac-

cepted by the percentages required by the provisions of that paragraph or of section 1, in which event it shall enter an order approving and authorizing such alteration or modification submitted under paragraph (9).

(11) (a) Every carrier to which paragraph (1) of this section is applicable shall call a meeting of stockholders for the election of directors to be held within sixty days after the effective date of this Act. The present terms of office of all directors and officers of such carrier shall terminate upon the election and qualification of their successors, as herein provided, notwithstanding any provision of the charter or by-laws of such carrier or of any State law to the contrary. The terms of office of all directors elected at such meeting shall be the unexpired terms of present directors.

(b) No holding company, individual, group, partnership, association, corporation, or other entity (excluding any operating common carrier subject to Part I of the Interstate Commerce Act, but not excluding any holding company or other nonoperating corporation which has been held or which may be held to be a common carrier within the meaning of said Act)—

(A) which exercises direct or indirect control of one or more railroad corporations the properties of which are not in the custody of a court in proceedings under section 77 of the Bankruptcy Act; and

(B) which also owns shares of voting stock of any railroad corporation to which this Act is applicable, in sufficient number to enable the owner thereof to control such carrier,

shall, during the period the debtor shall be in possession of its properties and in control of the management and operation thereof under this Act, vote such shares for the election of more than a minority of the directors of any railroad corporation to which this Act is applicable.

(c) No stock of any common carrier to which paragraph (1) of this section is applicable, which stock is owned or controlled directly or indirectly by, or held for the benefit of, or pledged as security by, any other common carrier to which paragraph (1) of this section is applicable, shall be voted for the election of directors during the proceedings under this Act, unless at the time of filing the petition for reorganization under section 77 of the Bankruptcy Act as amended, the transaction or transactions by which such stock was acquired, and the ownership and control of such stock, had been approved by the Interstate Commerce Commission pursuant to the applicable provisions of section 5 of the Interstate Commerce Act, as amended or unless the two carriers are debtors in the same proceeding under section 77 of the Bankruptcy Act, as amended.

(d) In the determination of whether a quorum is represented in attendance at any meeting of stockholders of any carrier to which paragraph (1) of this section is applicable, held during the pendency of proceedings under this Act, for the election of directors or for other purposes, all voting stock standing in the name of, or held for the benefit of or pledged or assigned by, or directly or indirectly controlled by, any carrier, holding company, individual, corporation or other entity to which subparagraph (b) or (c) of this paragraph (11) is applicable, which voting stock may be not represented at said meeting shall nevertheless be considered and counted as being represented in attendance at such meeting, notwithstanding any provision of the charter or by-laws of such carrier or the provision of any State law to the contrary.

(12) Any party having properly filed an application under section 5 of the Interstate Commerce Act to control, or participate in the control of, a carrier to which section 2 of this Act applies, is hereby authorized to intervene gen-

erally in and become a party to the proceedings under this Act affecting such carrier.

(13) No readjustment of financial structure or other proceeding under this Act and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

(14) In judicial review of any order of the Commission approving or authorizing a proposed alteration or modification entered pursuant to the authority of paragraph (10) of this section 2, the court (and any court on review thereof) shall not be concluded by any determination or finding made by the Commission as to matters either of law or of facts, and the court shall make full and independent reexamination and review of the issues and of the evidence and thereafter shall arrive at a decision in the exercise of its independent judgment based upon such judicial reexamination and review. Any order of the Circuit Court of Appeals relating to any alteration or modification under paragraph (10) of this section 2 shall be reviewed by the Supreme Court of the United States upon appeal made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the applicable provisions of the Judicial Code.

(15) In the case of any carrier which is under the jurisdiction of the United States Courts on the effective date of this Act, and to which the provisions of paragraph (1) of section 2 of this Act would be applicable if such carrier

were in the custody of such courts on such date, and with respect to which carrier, securities under a plan of reorganization approved by the court and Commission had already been issued, a holder of a security of any class which rejected, or was not entitled to vote on, such plan in accordance with subsection (e) of said section 77, may, within ninety days after the date of enactment of this Act, apply to the Commission for amendment of the plan to the extent necessary to permit the issuance, to holders of securities of such class, of options or warrants as described in subsection (b) of said section 77. If the Commission shall find after hearings that the proceeds of the exercise of such options or warrants will be applied in conformance with the requirements of section 20 (a) of the Interstate Commerce Act (including, without limitation, the application of such proceeds to the retirement of outstanding obligations of the carrier), it shall approve such application and shall order the carrier to issue such options or warrants.

SEC. 3. *The provisions of sections 1801, 1802, 3481, and 3482 of the Internal Revenue Code and any amendments thereto, unless specifically providing to the contrary, shall not apply to the issuance, transfer, or exchange of securities or the making or delivery of conveyances to make effective any alteration or modification effected pursuant to section 1 or section 2 of this Act. No income, gain, or profit taxable under any law of the United States or of any State, now in force, or hereafter enacted, shall be deemed to have accrued to or have been realized by such carrier by reason of such an alteration or modification, or by reason of any transaction authorized in the last sentence of paragraph (3) of section 2.*

SEC. 4. *If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision*

to other persons or circumstances, shall not be affected thereby.

And the House agree to the same.

Amend the title so as to read: "An Act to enable debtor railroad corporations, whose properties during a period of seven years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structures; to alter or modify their financial obligations; and for other purposes."

HATTON W. SUMNERS,
SAM HOBBS,
MARTIN GO[illegible]
CHAUNCEY W. REED,
JOHN W. GWYNNE,
Managers on the Part of the House.

B. K. WHEELER,
ED C. JOHNSON,
CLYDE REED,
Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1253) to enable debtor railroad corporations expeditiously to effectuate reorganizations of their financial structures; to alter or modify their financial obligations; and for other purposes; submit the following statement in explanation of the effect of the action agreed upon and recommended in the accompanying conference report:

The House amendment strikes out all of the Senate bill after the enacting clause. The Senate recedes from its

disagreement to the amendment of the House, with an amendment which is a substitute for both the Senate bill and the House amendment. The material differences between the House amendment and the substitute agreed to in conference are noted in the following statement.

The House amendment proposed the reenactment of chapter XV of the Bankruptcy Act for the modification or alteration of obligations of carriers. The Interstate Commerce Commission in 1945 proposed a variation of the principle of chapter XV, while retaining the essential purpose of providing a means for alteration or modification on applications of carriers when necessary in the public interest, as well as in the interest of the carriers and of their securityholders. The conference substitute adopts the variation proposed by the Commission in 1945.

The essential principle of chapter XV and of the Commission proposal of 1945 is the provision of means of altering carriers' obligations with fairness to the owners of those obligations, and in roder to avoid the drains, wastes and losses consequent upon drastic reorganizations. This underlying principle was in effect reaffirmed by the House when it passed the amendment. The conference substitute adheres to this plan.

The difference between the method of chapter XV and that of the Commission variation is primarily one of lodging in the Commission greater power through the Commission proposal. Under chapter XV the Commission was not expressly charged with the duty of considering proposed alterations or modifications as in substance a reorganization or readjustment plan. Under the Commission proposal of 1945, which is now substantially adopted in the conference substitute, the Commission is charged with such duties.

Under chapter XV the principal proceeding was conducted in court. Under the Commission proposal, which is now included in the conference substitute, the principal proceeding is before the Commission. The court is called on only for purposes of review.

The variation introduced in the Commission proposal of 1945 and now accepted in the conference agreement has had the support of leaders of life-insurance companies, banks, and the railroad industry, as well as of the Commission and also of representatives of railroad labor organizations.

The House amendment included in its first seven sections provision for the relief of railroads which are now in proceedings under section 77 of the Bankruptcy Act and for the relief of their securityholders. The conference agreement also provides such relief, although in considerable part with modifications and differences from the particular form of relief included in House amendment. The conference agreement retains the requirement of the House amendment that before a carrier can qualify for such relief it must show earnings coming up to a specified standard for the 7-year period from 1937 to 1945, inclusive. The 7-year standard has been retained in the conference agreement, with certain improvements introduced so as to recognize actual earnings and not limit the standard merely to the reported earnings. Under the tax laws there were large bookkeeping deductions from earnings in order to effect tax savings; such bookkeeping was authorized by statute and was used by corporations throughout the country, in both the industrial and railroad field as well as in other fields. The Interstate Commerce Commission has on a number of occasions called attention to the fact that there is a difference between reported earnings and actual earnings, which are much higher. The conference substitute has recognized the circumstance thus pointed out by the

Commission. In this respect, as well as in certain other respects, the earnings figures included in the 7-year standard are stated somewhat differently in the conference amendment from the form of their statement in the House amendment.

In addition to this condition imposed in the House amendment the conference agreement has also imposed another condition, which was contained in the bill as passed by the Senate. That condition limits the application of this portion of the bill to railroads whose gross railroad operating revenues for any of the calendar years 1942 to 1944, inclusive, were in excess of $50,000,000; any other carriers, debtors in the same proceedings with such carriers, also come under the conference substitute, even though not earning the $50,000,000 revenue just specified. This condition was suggested by the Interstate Commerce Commission.

The House amendment provided a period of 18 months in which carriers coming under the act would be able to work out reorganizations or readjustment of their financial affairs. The conference substitute also provides for an 18-month period, or such longer period as the Commission may authorize. At the end of such period the carrier would file a plan of adjustment with the Interstate Commerce Commission in accordance with the procedure proposed by the Commission in 1945 and above described. The House amendment had provided for proceedings under chapter XV; the difference between the two types of proceeding, under chapter XV and under the variation proposed by the Commission in 1945, is discussed above.

The House amendment provided that control of the properties should be returned to the debtor railroad companies. While the conference substitute also has such a

provision, the conference substitute adds that the properties are to be retained in the custody of the court and subject to its supervision.

Under the House amendment carriers would have had the power to use their large surplus liquid resources for the retirement of debt through purchase, discount, and otherwise—in this respect be permitted to avail themselves of the same advantages which have been used by railroads not in the hands of the courts and which the Interstate Commerce Commission has urged all railroads to invoke. Unfortunately railroads that have been in the hands of the courts under section 77 have been deprived of the tremendous opportunities of which nearly all other large railroads have made use. The conference report remedies this. Provision is also made for the proposal of alteration or modification of obligations of carriers by the Commission itself, in the event that the plan, or substitute plans, proposed by the carrier, have not gone into effect.

The House amendment provided for independent reexamination and review by the courts of any plans which might be issued by the Commission. The conference substitute makes similar provision.

The conference substitute contains a provision customary in reorganization statutes protecting reorganizations against taxes of certain kinds. This is the customary practice since no true profit is realized on the exchange of securities, and yet without such a protective provision taxes might be assessable because it might be held that there is an apparent though not an actual profit. The conference agreement also provides for protection against tax on savings effected through retirement of debt; a statute to similar effect has been available to railroads and other corporations and the Congress has already passed a bill to

extend that statute temporarily; the companies under section 77 have not been permitted to retire their debt at a discount although most other railroads have availed themselves of this important opportunity to which the Interstate Commerce Commission has also called particular attention.

The conference agreement accepts the limitation, as to the class of carriers covered by the bill, included in paragraph (11) of section (2) of the bill as previously passed by the Senate, but the conference agreement narrows that limitation in certain respects.

Paragraph (15) of section (2) deals with carriers still in the jurisdiction of the United States courts in whose cases reorganization securities have already been issued under a reorganization plan. Paragraph (15) makes it lawful for the carrier, with the approval of the Commission, to amend the plan to the extent of issuing options or warrants to take care of those securityholders who would otherwise be wiped out.

On the subject of judicial review, the point was raised in the debate on the bill in the House that any provisions which do not grant the right of appeal as a matter of right are exceptional. The Congress did not intend in chapter XV to foreclose a reorganization plan without the right of appeal against it to a court higher than the court of original jurisdiction. The House Judiciary Committee did not interpret chapter XV to deny the right of appeal as a right. However, the committee readily accepted the proposal to make the congressional intent absolutely certain and clear, that an appeal from the trial court must be granted. Had the conference agreement used chapter XV, instead of the Commission's substitute procedure, the conferees would have insisted on reaffirmance of the right of appeal to the Supreme Court, including the affirmation that

Congress intended that such an appeal should be granted as a matter of right in all cases under chapter XV as originally enacted and later reenacted.

Inasmuch as the conference agreement uses the Commission's modification of the chapter XV procedure, the conference agreement provides for the right of appeal to the Supreme Court from the circuit courts of appeals on plans issued by the Commission under paragraph (10) of section 2 of this act.

HATTON W. SUMNERS,
SAM HOBBS,
MARTIN GORSKI,
CHAUNCEY W. REED,
JOHN W. GWYNNE,
Managers of the Part of the House.

APPENDIX "H"

President's Disapproval

I am withholding my approval of S. 1253, entitled "An act to enable railroad corporations, whose properties during a period of seven years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structures; to alter or modify their financial obligations; and for other purposes."

Even though I am familiar with the deficiencies and inequities and the evils that exist under Section 77 of the present bankruptcy act, I fear that this new bill will not accomplish the purpose for which it was intended.

The bill contains two sections, the first of which contemplates the prevention of bankruptcy proceedings where practicable; the second contemplates the reorganization of certain railroad carriers by the institution of proceeding under Section 1 of the bill for readjustment of their financial affairs.

Objections which I have to the bill include the following:

The bill fails to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in Section 77 proceedings, by reducing the interest rates on their bonds and other debt down to the level of the interest rates paid by railroads not in Section 77 proceedings. I reiterate a statement which I made in my message to Congress on the state of the union which is as follows, "Low interest rates will be an important force in promoting the full production and full employment in the postwar period for which we are all striving."

The bill does not adequately cure the evil, present in reorganizations under Section 77, of permitting improper controls of railroads after their reorganization.

The bill fails to provide full protection against forfeiture of securities and investments.

The level of fees and expenses in reorganization cases under Section 77 has been excessive. This is not corrected in this bill. Affirmative provisions to curb this evil and to bring it under strict control should be included in any bill which may be enacted.

The bill excludes from benefits certain railroads which should be brought within its provisions if it is to become law. In this regard it appears that the $50,000,000 limitation in Section 2 of the bill would exclude some railroads for whose exclusion there appears to be no logical justification.

This bill fails to correct a serious abuse which I condemned in the course of the Senate railroad investigation. I refer to the abuse of diverting under cover of a reorganization plan, the funds of a railroad for the purchase of its own stocks in the market.

On the other hand, the bill does incorporate principles for which I was one of the sponsors in the Senate. I commend particularly the emphasis which the bill places on the principle that reorganizations must give primary consideration to the public interest, and to the best interests of the railroads which are being reorganized.

This requires among other things that reorganizations shall place control of railroads in persons primarily concerned with transportation for the communities served and for the nation as a whole, without any strings direct or indirect, conditional or otherwise, to institutions or others in distant financial centers.

Such regard for the public interest will also help the stockholders, whether they be railroad employes who have invested in the stocks of the companies for which they

work, or ordinary investors, desirous of safeguarding their investments, but not of helping any interest to capture control of their railroad. These stockholders, whom the bill justly seeks to protect against forfeiture, can and should get such protection, but without enabling any financial interests to use such legislation to acquire control.

By withholding my signature to this bill I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities.

I believe that the next Congress can pass a bill which will meet the stated objections and which will be in the best interests of the public, the railroads, the bondholders and other creditors, and the stockholders.

APPENDIX I.

The Railroad Reorganization Bill, S. 1253, was the culmination of over three years of intensive effort to save two billion dollars of investments made by hundreds of thousands of stockholders and junior bondholders in railroads now in process of reorganization under Section 77 of the Bankruptcy Act. Those investments will be wiped out under pending plans of reorganization unless legislation is enacted to prevent it. This bill was designed and passed by the Congress primarily for that purpose.

Those who have supported this legislation will be definitely heartened by the declaration of principles contained in the President's memorandum stating why he withheld his signature from the bill. For it is clear that the broad principles announced by the President are shared by the proponents and supporters of this legislation. Broadening of the bill to meet the requirements of the President's objections can and will be drafted. Such a bill will be promptly introduced at the next session of the Congress. As Congress has already overwhelmingly committed itself to such legislation and the President has declared that he, too, favors its purposes, the prompt enactment of such a measure appears certain.

While this legislation was under consideration in the Committees of the Senate and House, a number of courts and the Interstate Commerce Commission recognized the appropriateness of cooperating with Congress in meeting this public problem and abstained from taking steps which would have carried forward any of the pending reorganization plans under Section 77. This was months before the legislation came up for a vote in either the Senate or House. Now that the legislation, both in the form in which it was

reported by the respective Committees of the Senate and House and in the subsequent form contained in the Conference Report, was passed by an overwhelming vote in each chamber and the objectives of the legislation have received the approbation of the President, it is confidently hoped that the courts and the Commission will take no steps in support of furtherance of pending reorganization plans under Section 77, but will instead await action by the Congress and the President on legislation giving effect to the principles favored by both.

CLYDE M. REED
JAMES M. TUNNELL
SAM HOBBS
CHAUNCEY W. REED

Washington, D. C.
August 14, 1946.